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A

COMPENDIOUS VIEW

OF THE

CIVIL LAW,

AND OF

THE LAW OF THE ADMIRALTY,

BEING THE SUBSTANCE OF

A COURSE OF LECTURES

READ IN THE

UNIVERSITY OF DUBLIN,

BY

ARTHUR BROWNE, LL. D. S.F.T.C.D.

PROFESSOR OF CIVIL LAW IN THAT UNIVERSITY, AND REPRESENTATIVE IN THREE PARLIAMENTS FOR THE SAME.

THE SECOND EDITION, WITH GREAT ADDITIONS.

VOL I.

CONTAINING A VIEW OF THE CIVIL LAW.

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1802.

TO THE

PROVOST

FELLOWS AND SCHOLARS,

OF THE

COLLEGE

OF THE

HOLY AND UNDIVIDED TRINITY,

NEAR DUBLIN.

THIS WORK IS

MOST HUMBLY DEDICATED,

BY THEIR OBLIGED AND

DEVOTED SERVANT,

ARTHUR BROWNE.

PREFACE.

MY principal object in publiſhing the following work, has certainly been to prove induſtry, and to ſhew that I do not wiſh to hold any office as a ſinecure. I cannot however but think, that it may be uſeful to the younger members of the bar, who may wiſh to gain ſome general knowledge of the civil law.

It is ſurpriſing how few gentlemen of the legal profeſsion, (excepting thoſe, and they are not numerous, who have ſtudied in Scot-

much that he has acquired from Gibbon the character of a learned, ſpirited, but *rambling* writer. Laſtly, Heieneccius, an author powerful in erudition, by a German dreſs and ſectional form, diſguſts the Engliſh eye.

It occurred to me, therefore, that a ſhort work, in the method and order adopted by Mr. Juſtice Blackſtone, in his Commentaries on the Laws of England, as nearly as the ſpirit of the two laws would poſsibly allow, might, by the familiarity of its order, entice the ſtudent of the common law to take at leaſt a curſory and general view of this more ancient code, when the conciſeneſs of the ſketch could not poſsibly encroach on his time. If the text be ſtill unintereſting to him, perhaps ſome of the notes, as far as they relate to the ſtatute law, or contain any new matter, may engage his attention. I have called it the *ſubſtance* of lectures, becauſe the reader muſt naturally

ciſeneſs gave much. Quotation, and indiſcriminate transfuſion, would have ſwelled the work, with moderate pains; but compreſsion and ſelection of points really important, were attended with conſiderable labour.

In ſhort, my hope has been that the ſtudent at the inns of court, after peruſing the inimitable commentaries on the law of our own countries, might be tempted to look into an epitome of the civil, not preſuming to any the ſmalleſt emulation in merit, but whoſe comparative extent is proportionate to the comparative importance of the two laws to him.

The Engliſh forum ſometimes treats the ſtudy of the civil law with levity, but may its diſciples be permitted to ſay, that it never was deſpiſed but by thoſe who were ignorant of it. The very numerous caſes in our books

CONTENTS.

TO

THE FIRST VOLUME.

INTRODUCTORY CHAPTERS.

PAGE

ON the Utility of the Study of the Civil Law - - - - - 1

On the comparative excellence of the Civil and Common Laws - 21

BOOK I.

OF THE RIGHTS OF PERSONS.

CHAPTER I.

Husband and Wife - - - - 49

CHAPTER II.

Husband and Wife continued - - 82

PAGE

CHAPTER III.

Master and Servant - - 97

CHAPTER IV.

Father and Son - - - 112

CHAPTER V.

Guardian and Ward - - 129

CHAPTER VI.

Corporations - - - 141

BOOK II.

OF THE RIGHTS OF THINGS.

CHAPTER I.

Origin of Property and Division of Things 167

CHAPTER II.

Of Things or Hereditaments Incorporeal 175

CHAPTER III.

Of Eſtates in Things - - 186

CHAPTER IV.

Of Eſtates upon Condition - - 200

CHAPTER V.

Of Eſtates in Jointenancy, Coparcenary, and Common - - - 211

Remainders and Reverſions - 213

CHAPTER VI.

Law of Deſcents - - - 217

CHAPTER VII.

Of Title by Occupancy - - 234

CHAPTER VIII.

Of Title by Prescription, Escheat, Forfeiture and Alienation - - - 246

CHAPTER IX.

Of Title by Gift; inter vivos, mortis causa, and propter nuptias - - 259

CHAPTER X.

Of Title by last Will or Testament - - 270

CHAPTER XI.

Of Title by Contract - - - 343

BOOK III.

ON WRONGS AND THEIR REMEDIES.

CHAPTER I.

On private Wrongs - - - - 396

CHAPTER II.

Of public Wrongs - - - - 411

CHAPTER III.

Of the Roman Courts and Actions - 431

On the Practice of the Ecclesiastical Courts 451

APPENDIX - - - - - 511

ERRATA & OMISSA.

VOL. I.

PAGE 10, line third of the note, for *diſcretion* read *direction*.
P. 17, line 19, before *inſtituted* inſert *the*.
P. 25, line 15, after *civil* read *law*.
P. 32, line 21, after *imperial* read *law*.
P. 41, line 7, laſt word, dele *an*.
P. 54, line 15, the *ſemicolon* ſhould be after the word *mina*.
P. 55, line 12, dele *abſolutely*.
P. 74, *note*, firſt line, for *ſay* read *ſays*.
P. 78, firſt line, for *to* the parties read *on* the parties.
P. 80, note, third line, for *that conſent* read *the want of that conſent*.
P. 88, note, fixth line from the bottom, for *direction* read *diſcretion*.
P. 114, line 8, for *will* read *by will*.
P. 117, line 1, for *as alſo* read *nor*.
P. 121, laſt line but two, after the word *line* dele the *comma*.
P. 123, laſt line, dele *their*.
P. 127, note, line 10, for *excuſed* read *excuſe*.
P. 128, note, for *de ſi* read *ac ſi*.
P. 170, note, laſt line but one, tranſpoſe the *comma* before *habet*.
P. 180, line 3, for *by* read *to be*.
P. 182, line 19, after *actus* dele the *ſemicolon*; after *via* put a *comma*.
P. 184, firſt line, for *there* read *three*.
P. 187, note, line 2, after *ſome* dele the *comma*.
P. 189, line 5, after the word *acquired*, for *and* read *an*.
P. 200, note, for *third book* read *laſt chapter of this book*.
P. 210, laſt line but three, for *where firſt* read *where the firſt is*.
P. 213, line 16, for *warrantry* read *warranty*.
P. 214, laſt line but two, after *object* dele the *comma*.
P. 232, note, fifth line from the bottom, for *adminiſtration* read *adminiſtrator*.

ERRATA & OMISSA.

Page 236, note the third, for *poſtliminio* read *poſtliminii*.
P. 257, note the 21ſt, after *brevis* dele the *period*.
P. 268, line 16, for *incumbrances* read *incumbrancers*.
P. 270, note, fourth line, for *kind* read *kin*.
P. 306, note, for *Cæcina's ſhare* 115l. read 1,150l.
P. 313, line the third, inſert *to* before *overwigh*.

In ſpeaking of degrees in colleges, it was omitted to be obſerved that Dr. Chriſtian holds, that no degree can have been given in canon law ſince the reign of Henry VIII. yet in the college of Dublin degrees are conſtantly given *in utroque jure*. It has alſo been controverted, whether a mandamus will lie for a degree. Though Dr. Bentley's caſe be not directly in point, it ſhould ſeem as a corollary from that caſe that ſuch a mandamus would lie.

It muſt be obſerved alſo, that three notes have been inſerted erroneouſly, viz. notes 30—31—and 33, in pages 472—473—and 475, which are found alſo in the ſecond volume. Though the repetition of them might be juſtifiable from their nature, and to ſave the trouble of referring from one book to another, it has, in fact, been a miſtake which, with the other errata of the preſs, muſt be aſcribed to the unavoidable inconveniences ariſing from the author and the printer reſiding at a great diſtance from each other, in different countries, and correſponding only by letter.

INTRODUCTORY CHAPTERS.(1)

CHAPTER I.

ON THE UTILITY OF THE STUDY OF THE CIVIL LAW.

THE luſtre of the Roman name, which has dazzled all ſucceeding ages beyond their hope of competition, was not confined to arms. It was the peculiar glory of the nation which ſubdued the world, to furniſh mankind with a code of laws, containing the moſt perfect ſyſtem of juſtice and equity between man and man, which has ever been produced by human invention. I ſay between man and man, to avoid the exceptions which may poſſibly be taken to its public regulations, as fraught with an arbitrary ſpirit. And when it is called the moſt perfect of human codes, the epithet means not to aſſert an entire freedom from defects, which muſt be incident to every human inſtitution. But this we may affirm with ſafety,

(1) Theſe were delivered as *Prælections* in the Univerſity of Dublin, which circumſtance will explain ſome paſſages therein.

that as a collection of written reaſon; as a gre body of principles, founded in natural equity (2 it has no rival. The general excellence of i rules, and juſtice of its deciſions, have extorte from all the nations of Europe, an acknowled ment of its pre-eminence. They have in conſe quence either adopted it, as their own municip law; or, where circumſtances and events forbad ſo general an admiſſion, have been glad, in a caſes where their own laws were ſilent or imper fect, to ſearch out the dictates of natural equity in the illuſtrations of this code. Hence, thoug the phraſes civil and municipal are, in ſtrictneſ of ſpeech, ſynonimous, yet the law of Rome (a if the world was yet one ſtate under its dominion) has emphatically vindicated to itſelf the title o the *civil* law.

That it has obtained this pre-eminence, we ſhall not wonder, when we reflect on the ſuperior advantages which attended its formation. Moſt laws (not excepting thoſe of England) have been immaturely born in the early times of rudeneſs and barbarity, and receiving their accretions from chance, or ſudden emergency, appear deformed maſſes, compoſed of ill-jointed, ill-proportioned members; the laws of ſhreds and patches.

(2) As a pattern, therefore, it muſt be admired and conſulted, even where it has no binding force.

With us, the moſt liberal conſtructions and interpretations of the law by judges, perpetual new acts of the legiſlature on the ſpur of the occaſion, together with the creation and advancement of ſeparate courts of equity, have been neceſſary to ſupport a ſtructure, which, barely ſufficient for convenience, never can admit much beauty. Far different was the fortune of the civil law. It originated in times of the higheſt civilization, the offspring of philoſophy (3) and ſcience. The compilers of it, though at the head of the legal profeſſion, were not mere lawyers, but philoſophers and ſtateſmen. Nor were they confined to the reſources of their own minds. The labours and compilations of many ages and countries, beginning with the foundation of Grecian legiſlative wiſdom, afforded them powerful auxiliaries. Under their auſpices, the Inſtitutes of Juſtinian appeared in all the beauty which method, arrangement, and even the ornaments of ſtyle, could add to the natural charms of truth and equity.

It ſhould ſeem ſcarcely neceſſary to ſtate more than has been premiſed, in order to eſtabliſh the object of my preſent Prælection, which is to point out the utility of ſtudying the civil law, and to ſhew, that the labour of its diſciples will not be

(3) It is amuſing to obſerve, how the principles of the philoſophy of the Ancients, eſpecially of the Stoic Diſcipline, ſhew themſelves frequently throughout this Code.

ill beſtowed. To uſe the language of an eminen author, did we find nothing in this law but a mor thorough knowledge of the great principles o juſtice—a more accurate delineation of the bound aries between right and wrong—a ſeries of excel lent rules applicable to our own conduct, and to all the affairs of human life—ſublime and elevated notions of philoſophy and religion—it ſurely muſt be entitled to the higheſt place in our eſteem. Will the liberal mind deny, that ſuch an inveſtigation muſt be amply repaid?

But excluſive of its abſtract theoretical excellence, this ſtudy offers the moſt ſignal aids, both in the tranſactions of individuals, and in the intercourſe of nations.

In the firſt place—the civil law is an excellent repoſitory of thoſe rules, which ought to guide the natural conduct of ſtates, and contains in its boſom the law of nations, as well as of nature. It is evident that nations, in their tranſactions with each other, muſt have a common appeal to the law of nature and right reaſon. But this is originally an unwritten ſtandard. The philoſophic Roman legiſlator may be ſaid to have reduced it to writing, and the world has decreed, that to his rules, as declaratory and explicative of the law which right reaſon has dictated to nations, the appeal ſhall lie. It becomes therefore a ſcience abſolutely eſſential to the ſtateſman and negociator. No where will

they find the rights of ambaſſadors, the laws of war, the rules of fœderal conſtruction, ſo well or ſo accurately laid down (4).

Grotius, and other writers on public law, have drank deep of theſe ſprings, and acknowledged their obligations to the Roman code. It is impoſſible for us even to underſtand the technical language or mode of reaſoning of foreign powers, without reference to this law. Some writers (5) have imputed that ſuperiority in negociation which foreigners, particularly the French (6), claim over us, to their ſuperior knowledge of the civil law. They probably attribute too much efficacy to a favourite ſtudy, but that this comparative ignorance muſt have its effect can ſcarcely be doubted. How is that man qualified to ſettle and confirm a treaty, who does not know the ſubſequent conſtruction which it may admit, or the rules which are to guide and govern its interpretation? How

(4) *In iis quæ ſola ratio commendat, a Jure Romano ad Jus Gentium, tuta ſit collectio*, ſays Bynkerſhoek, 2 J. Pub. Cap. 14.

On the civil law, ſays Sir William Scott, great part of the law of nations is founded.—*Judgment on the Swediſh Caſe of Convoy*, 1799.

(5) E. G. Ayliffe.

(6) This ſuperiority, if true, has been probably owing to the nature of their government—better formed for *ſecrecy* and *diſpatch* than ours.

can we anſwer the claims and manifeſtos of other nations, if delivered in phraſes, and reſting upon principles and rules of argument with which we are unacquainted (7)? Leagues and alliances, tariffs and pacts of commerce, treaties of peace, and proclamations of war, all the diſputes in Europe about the right of ſucceſſion and limits of territory (8), have ſuch a reference to this law, that, without ſome acquaintance at leaſt with its outline, modern hiſtory is unintelligible.

Having diſcuſſed the advantage of this purſuit in public, we proceed to ſpeak of its uſe in private affairs.

If we regard the Continent, proofs are unneceſſary; a momentary view will ſuffice. The civil code, among moſt continential nations, is the common law of their land, and governs all the

(7) A remarkable inſtance was offered, not many years ſince, of the utility of this knowledge upon ſuch occaſions, by that prodigy of univerſal ſcience, Lord Mansfield, the dawn of whoſe celebrity was not a little brightened by the anſwer to the Pruſſian manifeſto, relative to the Sileſian loan about 1753, in the compoſition of which anſwer he had a principal ſhare.

(8) Add the diſcuſſion of ſuch diſputes, as whether wars have been commenced juſtly—proclaimed in due form?—whether, in the conduct of them, the laws of war have been obſerved? all which points are decided by the law of nations, whoſe beſt expoſitor is the civil law.

tranſactions of individuals with each other, whenever it is not modified and controuled by poſitive ordinances, or oppoſed by conſtant uſage to the contrary; and from its principles light is borrowed, if the poſitive ſtatute laws are ambiguous or imperfect (9). This is the caſe particularly in Holland, and all the United Provinces (10), where it has obtained a greater authority than in any other country, perhaps on account of the excellent laws of trade which it furniſhed to that commercial nation. The practitioners in their courts refer to the Roman edicts with the ſame familiarity with which we ſpeak of an act of parliament (11).

In Germany, the aſſeſſors or judges of the Imperial chamber (which is the ſupreme court of the Empire) ſwear, upon entering into their office, that they will judge all cauſes according to the ordinances of the Empire, or in defect of them, according to the Roman civil law; and all writers

(9) So, often in England. Take this example: As to the diſtributions of inteſtates effects, where our laws are ambiguous or not ſufficiently expreſs, our courts are chiefly guided by the doctrine of one of Juſtinian's novels.

(10) Eſpecially Friſeland.

(11) The Senatus Conſultum Tertullianum, or the Lex Falcidia, is as well known to them, as the Statute of Frauds, or Entails, is to us. See a memorable inſtance in Bynkerſhoek, on the queſtion, Whether the widow may marry *intra annum luctus* in Holland?

agree, that it is the common law of the Empire(12) though it prevails less in the northern parts, especially among the Saxons, than elsewhere(13). The same, with little alteration, may be said of France. It is not always by the express letter of any law in the Roman code, when they do resort to it, that the tribunals of Holland and Germany are governed; the letter may not extend to the particular case; it is then by analogy and deduction that they derive light from its principles. Thus the *lex de pauperie* may in its letter be confined to damage done by the cattle of another, but in its equity and its reasoning, is extended to damage done by another's ship or boat. The *lex aquilia*, even if it had not mentioned shipping, would be construed in its reasons to apply to navigation; and this method must always be kept in mind by the English lawyer or judge, who

(12) The several districts and divisions of the Empire have their respective constitutions, ordinances, and provincial customs; but these are all in subordination to the civil law, are expounded by it, and when they are silent or deficient, that law is always introduced.

(13) The Imperial chamber consists of the counts and barons, who are called presidents, and their assessors. These assessors, who are in fact the judges, (the presidents in general not being acquainted with the laws) are required to be well informed in the civil and canon laws, and have usually spent a considerable time in the study of those laws in their universities.

wiſhes to derive uſe and advantage from the civil law.

If we turn to Italy, we ſee indeed the Venetians, who always maintained their liberties againſt the Roman emperors, partially adhering to their own laws, and rejecting even wiſdom, when moving from a hoſtile region. But in the papal territories, and more eſpecially in the city of Rome, where the canon law might expect undiſputed ſupremacy, it frequently gives place to its celebrated rival which reigns even in the Roman rota (14). In the other European ſtates, admitted in different degrees, it ſtands the interpreter of municipal law, and points the road to judicial ſtation. Even in our neighbouring kingdom of Scotland, the form and practice of the civil law are obſerved in all their proceedings; and not many years ſince, this knowledge was univerſally coveted by the gentlemen of that country, even thoſe unconnected with profeſſion, not merely as an avenue to profit, but as a moſt uſeful exerciſe of the underſtanding. If then we have any commercial or other intercourſe with foreign nations, if we would wiſh to underſtand their hiſtory, policy, or conſtitution, here is the proper and neceſſary clue to guide our ſteps.

Its benefits, within our own national domeſtic ſphere, are next to be eſtimated in the balance.

(14) The Roman rota reſembles our court of chancery.

In the courts, military, maritime, and eccleſiaſtical, its predominance is univerſally known. The firſt are by diſuſe almoſt fallen into oblivion; but the juriſdiction of the court of admiralty in England is of great moment and extent, and in it the knowledge of the law of nations (the great expounder of which, as has been obſerved, is the civil law) is moſt eſſentially neceſſary. In all ſuits to which the eccleſiaſtical courts are competent, the civil law has great influence. In teſtamentary cauſes it rules. Undoubtedly, in many caſes, common and ſtatute laws will interpoſe their power in the form of prohibition, but ſtill the ſubjects over which thoſe courts have a peculiar juriſdiction are exceedingly numerous; over this extenſive field, the civil and canon laws bear united ſway; the former uſually (15) paramount, the current of the latter defying purſuit without a previous knowledge of its parent ſtream, on whoſe model it was formed, and from whoſe ſources it has copiouſly borrowed.

(15) Indeed perfectly ſo in the courts military and maritime, and in teſtamentary cauſes in the eccleſiaſtical.

Mr. Reeves obſerves, that when the court of admiralty was erected, the laws of Oleron conſtituted a national code of maritime law for the diſcretion of that court, and whatever was defective therein was ſupplied from that great fountain of juriſprudence, the civil law, which was generally adopted to fill up the chaſms that appeared in any of the municipal cuſtoms of modern Europe.

An endeavour to perſuade the common lawyer to proſecute the theme of our preſent commendation, may be thought to admit more difficulty. It would certainly be pedantic to deny, that many lawyers may and do reach the ſummit of wealth and reputation without its aid. A certain technical knowledge, aſſiſted by exterior qualities or fortunate events, may often acquire the ſmiles of fortune and of fame. But ſtill, it will be true, that the man whoſe philoſophic ambition aims at ſomething beyond the ſkill of an able attorney; *Qui vult rerum cognoſcere cauſas;* who with a ſcholar's mind, wiſhes to know the rudiments and origin of the rules laid down for his inſtruction, ought to be a diſciple of Juſtinian as well as of Coke(16). How is this poſition (it may be aſked) conſiſtent with a truth univerſally known, that the foundations of the common law were laid in the feudal ſyſtem? Feudal principles, indeed, ſupplied the foundations, but were utterly incompetent to the ſuperſtructure. They breathed only war. Strangers to commerce and the arts of peace, they regarded landed property in the hands of the vaſſal, only as the inſtrument of military ſtrength,

(16) The great judge, who with ſo much glory preſided at the head of the law for one and thirty years, has manifeſted to the world how much the mind of the common lawyer (often, in former times, too narrow and confined) may be liberalized and extended, by a previous knowledge of morals and of the prætorian law.

and the ſource from whence the lord derived his ſupplies. On contracts, covenants, obligations, thoſe vaſt fields of modern controverſy; in ſhort, on all things called in the metaphyſical language of ſome legal writers (17), *things purely rational* (18), that ſyſtem was ſilent. To theſe deficiencies the full treaſures of Imperial juriſprudence offered a ready ſupply. It was eagerly (19) graſped, and all the learning of our early writers, Bracton, Britton, and Fleta, upon theſe ſubjects, ſhines in borrowed plumes. In proceſs of time, when the rude ſpirit of ancient chivalry was calmed, when the ſhackles upon alienation were ſtruck off, and wiſer policy calling the attention of the nation to its commercial advantages and inſular ſituation, expanded our ſails over every field of the ocean, a new ſeries of tranſactions aroſe amongſt men—new ſubjects of controverſy—new ſources of litigation and difficulties, which found no reſolution in feudal regulations. Hence

(17) Ayliffe—Wood, &c.

(18) Entia rationis; moral entities—*Vide Puffendorf's Introduction.*

(19) This law was the favourite of churchmen, who, in fact, formed great part of the lawyers of the time, and thence it is no wonder that it ſhould inſinuate itſelf, by inſenſible degrees, into the Engliſh juriſprudence.

The *maxims*, *rules*, and *reaſonings* of the civil law, have often been *adopted*, or uſed by way of *illuſtration*, by our common lawyers.

much of the civil law, which had diffuſively treated of theſe matters, was incorporated with our own, though by long uſe the debt is forgotten, and we are apt to conſider it as part of our original ſtock (20). If we add to theſe obſervations one further conſideration, that great part of the buſineſs of theſe countries is done in courts of equity, whoſe rules and practice, for the moſt part, trace their deſcent from the Roman forum, and that in Ireland, no diſtinction is made between the common and the equity lawyer, there will not appear much room for contemning in the temporal courts the knowledge of the civilian (21).

Theſe conſiderations induced me to make the experiment, whether an attempt to read a courſe

(20) Becauſe, after this inſinuation and incorporation, the diſtinction does not appear—and, becauſe it derives its binding authority from ourſelves. Beſides theſe ideas, many others have been evidently taken from the civil law, E. G. Informations *ex officio* by the Attorney General, and felons not having counſel, and witneſſes for them formerly not having been ſworn; but the inſtances are ſo numerous, that I muſt refer the reader to the following work at large, where he will find them in every page.

(21) I ſcarcely ever yet have met with a point not connected with the feudal law, on which, if Engliſh law books did not ſatisfy the doubt, I have failed to find its reſolution in the civil law. Take one inſtance which has juſt occurred to me, and on which, perhaps, there is no decided caſe in our books—that of markſmen to a will of lands, witneſſes that cannot write!

of lectures, inſtituting a compariſon between the Roman and Engliſh laws—expounding the former, and marking the rules, principles and practice, which it has tranſmitted to the latter, might be acceptable to the public and the Univerſity. That forenſic ſtudies are very properly made a branch of univerſity learning, has been ably argued by the celebrated commentator on the laws of England, and every plea which can hold for introducing into this place the ſtudy of the common, has tenfold force when applied to the civil law; accordingly Profeſſor Hallifax at Cambridge, and Dr. Beaver of Oxford, have lately obliged the world with a ſketch of their labours in this department. But, above all, the learned profeſſor of Glaſgow, receiving the additional encouragement which muſt attend this ſtudy in a kingdom where it ſo nearly approximates to the municipal law, has acquired moſt deſerved celebrity, and has attracted many of the youth of this country, as well as of England, within the ſphere of his inſtruction. Without pretending to vie with ſuch illuſtrious names, I ſhall have the ſatisfaction of reflecting, that I have at leaſt endeavoured to prevent the office I hold from being a ſinecure, and have ſet an example of labour to future (22) and more able

(22) Far be it from the writer, to inſinuate any thing in the moſt remote degree againſt his predeceſſors—their avocations—their tenure being only biennial; their profeſſions, which muſt have called their attention to ſtudies very different from thoſe of the law, ſhew ſufficiently why they could not have much applied to this buſineſs.

profeſſors, who may deprive the wandering ſtudent of every reaſonable pretext for ſeeking this knowledge abroad; whither, in moſt branches of learning however, not ſo much neceſſity, as prejudice in diſfavour of their own nation, added to the purſuits of pleaſure and love of travel, uſually lead them. Much has been done in the medical line to overcome the neceſſity of reſorting to the ſchools of our indefatigable northern neighbours. Let it be a pattern to juriſprudence.

Before I conclude, permit me to make ſome annotations on the objections which may poſſibly occur to the utility of ſuch a courſe of lectures, as well as to the advantages of this ſtudy in general. Theſe may, I think, be reduced to three. The firſt is—That many heads of the civil law are now become mere matters of curioſity, nothing analogous to them exiſting in modern inſtitutions.

Undoubtedly, that profeſſor would act erroneouſly, who ſhould employ the ſame time and labour in treating of obſolete doctrines, ſuch as ſervitude, adoption, and legitimation, which would be required by ſubjects ſtill forming conſiderable branches of the juriſdiction of our modern courts, for example—marriage and teſtaments. But, ſurely, the objection, that the former enquiries are uſeleſs, could no where be more unfortunately urged, than to the academic. Enquiries, which tend to illuſtrate Roman hiſtory and antiqui-

ties (23), and to explain numberleſs paſſages, words and phraſes in claſſic authors, can never appear unintereſting to the ſcholar. The man of taſte will be charmed with the dreſs which law (often branded as a ſcience rude and uncouth) has here aſſumed. The pandects are written with a beauty and elegance of ſtyle, which has wreſted this celebrated encomium from eminent critics, that the Latin tongue might be recovered by their aid, though all other authors were loſt.

To deny that ſuch works court our peruſal, will ſound harſhly in the collegiate ear.

The greater portion of this learned body cultivates, or is deſigned to purſue, the ſtudies of theology. To them, as has often been obſerved, this ſcience holds forth the moſt intereſting information. The New Teſtament was written, and the

(23) In ſuch illuſtrations ſo much has been done by Heineccius and others, that I can claim little merit therein, but that of a compiler. Indeed, all lectures are compilations; but let it not thence be fooliſhly argued, that they are uſeleſs. The ſtudent might have recourſe to the original books, and compile himſelf; but will he do ſo? It requires, probably, more time and labour than he is willing to beſtow. But when the labour of another has heaped together knowledge from many detached books, then he will receive inſtruction. Beſides, the man who does not read at ſtated times, ſcarce ever reads with effect; and that is one great uſe of lectures. The ſtudent is obliged to learn ſomething *every day*.

ſacred events recorded therein happened, in countries ſubject to the Roman yoke, and where Roman manners and cuſtoms were univerſally diffuſed; of courſe, the alluſions to the laws and uſages of that nation are frequent, and an acquaintance with them tends, in no ſmall degree, to illuſtrate and explain the Scriptures. Dr. Hallifax has made the ſame obſervation, and particularly and juſtly applied it to the writings of St. Paul.

Laſtly, let it be remembered, in reply to this objection, that if we ſeek in other laws ſuch knowledge as may ſuggeſt uſeful additions and improvements in our own, our reſearches muſt not be confined merely to the correſpondent parts.

I proceed now to a ſecond objection made to the dignity of this ſtudy, which is—that however juſt the encomiums which have been beſtowed on the order of inſtitutes, and the ſtyle of the pandects, yet, that the whole body of the civil law, taken together, is a confuſed, indigeſted maſs, without order, beauty, or harmony.

It muſt be admitted, that the Digeſts or Pandects are only collections of fragments, extracted from the written opinions of various lawyers, and the code is a compilation from the conſtitutions of different Emperors. In the junction of ſuch detached members we cannot always expect regular

ſeries, and ſome of the parts may appear contradictory (24). But when we conſider that the inſtitutes, celebrated for perſpicuity and method, furniſh an index and clue to this apparent labyrinth—that ſuch noble materials exiſt which require only the labour of arrangement, and that this labour is, in theſe days, almoſt entirely ſaved by the indexes and notes of numberleſs commentators, ſuch cavils will vaniſh, or appear the language of idleneſs. Were they founded in truth, they would but prove more ſtrongly the propriety and advantage of this work, and its regular arrangement.

The laſt and moſt grievous accuſation againſt this law is, that it breathes an arbitrary ſpirit, repugnant to thoſe principles which ought to be inculcated on the minds of the youth of theſe countries. Of this charge, I ſhould eſteem it a difficult taſk, indeed, to undertake the refutation; a labour which, however, Giannoni has not refuſed in his celebrated Hiſtory of Naples (25). He inſiſts, that this ſtigma originated in falſe

(24) It is ſaid alſo, that they are often applicable only to particular caſes, from whence no general principles can be drawn, and many laws which are found in one part of this collection are altered or amended in another. *The ſame, perhaps, may be ſaid of any code whatſoever.*

(25) A work ſtrongly recommended to civilians by Earl Mansfield.

conſtructions of ambiguous paſſages, made by the adulators of Frederick Barbaroſſa, then meditating encroachments on the liberties of the Empire. This opinion is ſupported by ſome modern writers even among ourſelves. Dr. Hallifax ſeems ſtrongly to countenance the opinion in a note to his preface. However, they ſeem to me to view the ſubject with a lover's eye, who, not content with a thouſand excellencies in the object of his affection, wiſhes to aſſert a total exemption from defect; I muſt acknowledge that it appears to me, that the maxim —*Princeps legibus ſolutus eſt*—and others of a ſimilar nature, cannot be explained away. It is true, the practice did not always coincide with this theory, becauſe no governors can expect a permanent obedience to laws, which they totally deſpiſe and tranſgreſs themſelves. And beſides, as civilization advances, and manners are poliſhed and ſoftened, the genius and temper of a nation, by inſenſible degrees, puts a controul on powers unlimited by the law and conſtitution. Thus, in France, many powers conſtitutionally exiſted in the monarch, which, though he would not voluntarily renounce, the genius of the times forbade him to exerciſe; and hiſtory informs us, that many of the Roman emperors were ſcrupulouſly obſervant of the laws.

Thus ſtands this well known charge, which, true or falſe, has, in my humble opinion, no relation to the preſent undertaking. The arbitrary imperial claims could only relate to the conſtitution

and rights of the public, and did not intermeddle with private juſtice. It is my buſineſs to treat of the rights of individuals with reſpect to each other, and the law by which the mutual controverſies of private men were governed and regulated. A law may be unfavourable to general liberty, and yet make excellent regulations reſpecting private property. This, in my opinion, is the caſe with the civil law. I am to treat of the relations of private men to each other, not of the relations of individuals to government and to the public—the rights of property, not of liberty; and if queſtions of public policy and conſtitution ſhould ſometimes neceſſarily intervene, can a more acceptable ſervice be done to the riſing generation, than to ſhew them the comparative inferiority of all other conſtitutions to their own? Let us not ſhut our eyes to inſtitutions containing much good, becauſe they alſo contain ſome evil. Diſcrimination and ſelection are proper employments of human induſtry. Let us cull the fruits, and reject the weeds—admire where admiration is due, without beſtowing injudicious undiſtinguiſhing approbation—and learn, by contemplating the miſchiefs reſulting from other forms of government, to love and revere our own, and ſtudy to preſerve it from all its enemies—from the violence of anarchy, as well as the encroachments of deſpotiſm; happy in the reflection, that if other ſtates have more accurately diſtinguiſhed the rights of property, no conſtitution has ſo nicely guarded and defined the privileges of freedom.

CHAPTER II.

ON THE COMPARATIVE EXCELLENCE OF THE CIVIL AND COMMON LAWS.

IN the preceding chapter, I have diſcuſſed the utility of the ſtudy of the civil law. The object of the preſent is a brief compariſon between the civil and common laws, as to their reſpective excellence. A more detailed one runs throughout all the ſubſequent chapters, but it was deemed uſeful to give an abridged view of their analogies and diſcrepances in this introduction. The conteſt of prevalence between them has long ſince ceaſed, but this conteſt, conducted on political rather than philoſophical grounds, engendered a cloud of heat and prejudice, which long obſcured a fair compariſon of their merits. At this diſtance of time, we can conſider the ſubject with diſpaſſionate ken, and not deny occaſionally the preference to each, as each in its turn has beſt regulated ſpecific ſubjects. A blind attachment to either is abſurd, and while I feel a predilection, founded, as I humbly conceive, on reaſon and reflection, for many parts of the Roman

code; and without quoting infinite authorities, am fortified in my opinion by one of the greateſt Lawyers (1) of this or any age, who has pronounced it the firſt collection of written reaſon that ever exiſted, I am willing to admit many and various inſtances of pre-eminence in our domeſtic inſtitutions. As to the obligations which the Engliſh Legiſlator has owed to Juſtinian, they have been treated of in the former prælection, and are not the objects of our preſent diſcuſſion. My immediate aim here is, to compare the diverſities of the Britiſh and Latian codes. Not that it can be expected that the limits of this treatiſe will admit many points of compariſon; to contraſt them in a few ſtriking inſtances, is all which the contracted ſpace of this ſpecies of compoſition will admit, while, at the ſame time, I may be able to convey to the ſtudent ſome knowledge of the correſpondent heads of each law.

In an Introductory Lecture, ſo eſſential to my general plan, but ſo purely didactic, the auditor muſt not demand that embelliſhment ſo often expected from this chair, nor ſuppoſe that the ſeverity of law can catch the varied lights of poetry, aſſume the garb of eloquence, or veſt itſelf in the colours of the hiſtorian. Even the celebrated commentator of England, who ſoars

(1) Lord Mansfield.

far above the ordinary path of didactic compoſition, has ſcarcely attained praiſe for more than unornamented neatneſs of ſtile. My object is inſtruction, not decoration.

The municipal law, both of Rome and Britain, is diſtinguiſhed into the civil and criminal, and the civil again into that which treats of the rights of perſons—of the rights of things, and of actions or remedies for the redreſſing of wrongs; and in both civil and criminal, the modes of trial, and the forms and conſtitutions of tribunals, will naturally offer themſelves to our conſideration.

We begin with comparing perſonal rights. And here the Engliſh laws have a total and undiſputed preference. The law of perſons at Rome, was the black code of perſonal ſlavery. Liberty, ſays Monteſquieu, ſpeaking of the political œconomy of Rome, was in the centre, ſlavery in all the extremities. He might have added, that liberty germinated in the root of domeſtic œconomy, but ſlavery withered every riſing branch. The maſter alone poſſeſſed the odious privilege of tyranniſing over all his family. Imagination cannot aggravate the picture of oppreſſion diſplayed in every private manſion of Rome, the renowned domicile of public liberty. Each roof reſounded with the cries of the tortured ſlave, whoſe ſubjection bore no reſemblance to the honeſt ſervitude of our menial domeſtics; whoſe unprotected rights boaſted

not even thoſe ſlender fences which ſurrounded our ancient villein, and retarded the rapacious violence of Gothic feudality; whoſe torments have only been paralleled by the horrors of that collonial ſyſtem, which has diſgraced humanity in later days. Like the modern African, he ſaw his children liable to be torn from his embrace, and hurried into the cruel arms of diſtant captivity; but he did not, like him, view in tantalizing contraſt, ſecurity and happineſs hovering over the children of his maſter. They were equally expoſed to the arbitrary will of one common ruler, modified only by variety of temper and gradations of paternal tenderneſs or obduracy. Neither ſon nor ſlave could acquire property to alleviate ſervitude, or redeem bondage. Their acquiſitions merged in the patriarchal lord, who preſided with unlimited ſway over their ſubjected intereſts, and determined their happineſs or miſery at his pleaſure. Nor had the liberty or ſecurity of the marriage ſtate attained to a much more elevated degree. In the later and politer times of Rome, indeed, the huſband, by ſelf refinement, as well as general habits, was reſtrained from perſonal brutality, and the ſeparate property of the wife was ſufficiently ſecured by ſettlements in ſome meaſure reſembling ours, but the marriage chain was of the moſt diſſoluble texture, and broken on the ſlighteſt cauſes. Cohabitation during the period of one year, conſtituted a marriage, ſtyled *by uſe*, and ſeparation for the ſhorteſt ſpace

of time before its expiration, annulled the union. Proofs the moſt vague and unſolemn produced divorce. When the marriage tye was ſo ſlight and uncertain, domeſtic felicity was fugitive and fickle. The education of children muſt have been neglected, though their legitimacy on account of this lax ſtate was more favoured than with us. Thus children born before marriage were legitimated by law, a doctrine attempted to be introduced into England by the canoniſts, and rejected by the barons, in that celebrated, conciſe, and energetic phraſe, *Nolumus Leges Angliæ mutari.*

With reſpect to the fourth and laſt relation of perſons, noticed by legiſlators, that of guardian and ward, the principles of the civil have been copiouſly borrowed by the Engliſh Juriſts, yet ſtill perhaps not ſufficiently to ſatisfy the philoſophic mind. In the eyes of ſome philoſophers the loan ſhould be augmented, ſince the former with provident hand guarded the property not only of the lunatic and the minor, but even of the fooliſh prodigal, who waſted his ſubſtance in riotous living; yet in placing women under guardianſhip at all ages, and in any ſituation, they offered an affront to the ſex, and one ſurely irrational, ſuperfluous and inſulting; and the legal reſtraint of prodigality, though imitated by Germany and Holland, countries accuſtomed to arbitrary rule, is juſtly rejected by liberty ordaining freedom of

action to all endued with reaſon, and by commerce demanding the unſhackled alienation of property. If the Romans, however, ſhould be thought to have any ſuperiority in regulating perſonal rights, to this branch it is confined.

We proceed now to the rights of things. In their diviſion of things, both laws are equally minute and accurate, but in the partition of eſtates in things, the *Lucidus Ordo* of the civil code predominates. The civilians knew nothing of that puzzled diſtinction between real and perſonal property, which pervades our legal ſyſtem of ownerſhip, which cauſes different ſpecies of property to deſcend in varying lines, and to different perſons—which obliges the heir, who controverts the pretended will of his anceſtors, to litigate a double ſuit, before a temporal and alſo a ſpiritual tribunal, perhaps with oppoſite ſucceſs, and repugnant deciſions—which deprives a great part of the community, poſſeſſed of valuable leaſehold intereſts, of that ſhare in the conſtitution which is poſſeſſed by the impoveriſhed cottager at their door—which involves the creditor in endleſs labyrinths, by diſcriminating different modes of executions adapted to the various diſtinctions of the debtors property liable to his demand. They knew no feudal fictions, which hamper our alienations, and load our conveyances two hundred years after their cauſes have ceaſed, while the ſage trembles to touch the wen,

now become part of the conſtitution. Simple and uniform in their regulations, clear and pellucid in their diviſions, they ſubjected lands and goods to the ſame diſpoſitions, and tranſmitted them in the ſame conduits to poſterity.

Let it be obſerved, that I have praiſed the ſimplicity of the diſpoſition, without as yet extending my obſervations to its effects. Uniformity and utility are not neceſſarily connected. All property deſcended in the ſame manner, but the mode itſelf may not be equally laudable with its unity. All property gavelled; with us gavelling is almoſt conſidered as a puniſhment, and has actually been made the inſtrument of penal laws. Yet gavelling is the policy of republics; it hurts the pride of families, it prevents the growth of eſtates, it forbids the towering caſtle to riſe, and the immenſe demeſne to ſpread, and ſwell the arrogance of primogeniture; but the Romans reverenced not the firſt-born; liberty did not glory in the vaſt poſſeſſions of her ſons. The conquerors of the world were taught to ſubdue themſelves, and to found their pride on the extended dominions of the ſtate; content as individuals with limited patrimony, their ambition as a people was to acquire unlimited dominion. They followed the original impulſe of nature and reaſon, implanting in the parental boſom equal love to all the progeny. The doctrine of primogeniture may be adopted by legiſlators, and

commended by philoſophers, but it certainly originated with barbarians, and was nurſed by ſavage pride. The preference of the male to the female line was equally unknown at Rome, nor was the daughter, any more than the younger ſon, left a dependant on the mercy, or a claimant on the juſtice, of the elder brother. The abſurd conſequences alſo, which ariſe from our marked diſtinction between the whole and half-blood, are the offspring of the feudal law, and ſtrangers to the juriſprudence of Juſtinian.

As to quantities of eſtate, the proprietor of land might hold an eſtate for ever, not in fee ſimple, but allodially. I need ſcarcely remind my auditors, that the deſcendants of the Northern nations were all ſuppoſed to derive their lands from the prince, and to hold under him. Thus with us all land is ſuppoſed to belong to the king, and all we, petty men, walk under the huge ſtride of this colloſſean principle. The higheſt eſtate was but in fee ſimple, held by ſtipendiary ſervice, feodum coming from *odh*, poſſeſſion, and *fee*, wages. Of this haughty policy, born in camps, and bred by war, the Italian land-owner never heard, till wafted on the din of arms from the hoſtile regions of the North. With eſtates entailed, they are ſaid, by Gibbon and many others, to have been utterly unacquainted, nor would commerce, which with us has undermined their effects, have had operation

upon a nation of warriors; yet ſomething analagous they appear to me to have known in later times at leaſt, under the name of ſubſtitutions, a name alſo given to ſome ſpecies of remainders, with whoſe nature they were intimate, both in theory and practice; and as frequently the T. in tail, or remainder man, not being a citizen of Rome, could not hold property, the heir was made truſtee for him by what was ſtiled a *fidei commiſſary ſubſtitution*, which among other cauſes introduced the doctrine of truſts at Rome as extenſively as among us, our truſts correſponding to their *fidei commiſſa*, not to their *uſus fructus*, as the name might at firſt hearing induce the ſtudent to believe. Their doctrine of incorporeal hereditaments is too minute to bear analyſis at preſent.

We come now to their canons, for finding out the heir, or perſon to whom the eſtate was to devolve on the death of the laſt poſſeſſor. They fled the abſurd principle which decrees that right to land never can aſcend, and bequeaths the property of the childleſs and inteſtate to his moſt diſtant relation, in defiance of parental claims, echoed perhaps by indigence and affliction, for which prepoſterous rule my Lord Coke can aſſign no better reaſon, than that land is heavy, *et gravia deorſum tendunt*. With more reaſon may we juſtify that law of deſcent in England, which, in the ſearch for a remote heir, guides us to the

blood of the anceſtor from whom the eſtate firſt deſcended, and as it came from the paternal or maternal line, reſtores it to their family. But perhaps Blackſtone himſelf, notwithſtanding his particular labours in that point, has had no great ſucceſs in defending the poſitionwhich for ever excludes the half-blood from the inheritance.

Our canon of deſcent, however, has not always departed from the civil computation, ſince it makes the inteſtate or deceaſed, and not the common anceſtor, the ſtem, from which branch out all rights to perſonal eſtate; but in the partition of the branches the analogy ceaſes, and in conſequence of varying laws of repreſentation, and diviſions, *per ſtirpes*, not *per capita*, grandchildren in Britain frequently become entitled to very unequal portions of money or goods, where Rome would have obſerved exact equality. And in determining the gradations of conſanguinity and affinity, the canon, and in regulating the degrees within which marriage is tolerated, the levitical laws are our guides and only luminaries, without the leaſt reſpect to the dogmas of the diſciples of Trebonian.

Not ſo has Britain viewed their principles of teſtamentary law. With implicit reverence here it has copied the wiſdom of the weſtern empire, with ſo little variation, that a compariſon of preference is not admiſſible, where ſimilarity ex-

cludes preference, ſave that which prior knowledge gives the teacher over the diſciple. Our ſpiritual courts almoſt implicitly obey the law of *unſolemn* wills among the Romans, and although to caſual obſervation, the obligations of the temporal tribunals to theſe funds of wiſdom may ſeem leſs obvious, yet upon cloſer inſpection, they will be found to boaſt but ſmall original poſſeſſions in this important province of juriſdiction.

The ſolemn will of the Romans, like our will of lands, was rather conſidered as a conveyance or alienation *inter vivos*, than as a teſtament. In the earlier times of the Republic, the ſolemnities indeed were tedious, and the fictions extravagant; but the corrected regulations of later periods evidently furniſhed hints for the proviſions in our ſtatute of frauds; a connection moſt pleaſingly elucidated by Lord Mansfield, in the celebrated caſe of Windham and Chetwind.

The law of legacies has ſervilely copied from the Imperialiſts, both excellencies and faults, ſo as even to admit their diſtinctions, however unreaſonable, ſuch as between time annexed to ſubſtance and to payment. In one ſpecies of legacies, however, attention to reaſon has made a notable difference, thoſe conditioned in reſtraint of marriage. By the civil law, all conditions in reſtraint of marriage are void, yet here Chancery

has only followed them *ſub modo*, where the legacy is given over, and another perſon particularly ſubſtituted by the teſtator to have the benefit of it, in caſe the condition be not complied with. *Reeves* v. *Herne*. 2. Eq. Ca. ab. 215. page.

With more wiſdom have the inſtitutes of the law of Scotland diſclaimed any regard to ſubtilties peculiar to the Roman ſyſtem, though they at the ſame time almoſt recognize it for their municipal law; and in matters of contract, tranſactions, reſtitutions, ſervitudes, tutorſhips, and obligations, determine all controverſies accordingly. See *Erſkine's Inſtitutes*, p. 15. *of Laws in General.*

Beſides the titles to eſtates ariſing from will and deſcent, thoſe of preſcription, cuſtom, deed, occupancy, acceſſion and tradition, were known to the civil law. With reſpect to occupancy, which Blackſtone, differing from Locke, conſtitutes the foundation of all property, our determinations ſeem to have been chiefly deduced from the Imperial, as appears from the inſtances ſelected by that illuſtrious profeſſor, reſpecting alluvions and derelictions of a river or the ſea, a doctrine which, however unimportant it may to us in Europe appear, is at this inſtant of no ſmall conſequence in torrid regions, where ſudden and violent alterations of the courſe of rivers occaſion warm controverſies as to the ownerſhip of the new-found land, of which the Ganges is

a memorable example. Acceſſion is a ſpecies of occupancy. If any corporeal ſubſtance received an acceſſion by natural or artificial means, the thing thus rendered more valuable ſtill belonged, in its improved ſtate, to the original owner. If animals became pregnant, if cloth was embroidered, if ground was built upon or improved, the advantage reſulted to the owner of the original ſubject; and theſe regulations were too obviouſly the dictates of good ſenſe, not to compel imitation among us.

But if the rule be ſtrained to convert a work of genius, written on the paper of another, into the property of the owner of the naked materials, it becomes ſo extremely abſurd, that this ridiculous imputation on the civil law muſt ſurely have been derived from ſome paſſages ill underſtood; and I have no doubt that literary property was by no means in a ſtate of inſecurity, which would render it ſo much inferior to ours (2).

On the heads of cuſtom and preſcription, we find memorable variances between their law and ours. With us, the time of preſcription is that which is oppoſed by no memory of man, or record to the contrary; but with them three years formed

(2) Intermixture of goods, one ſpecies of acceſſion, by our law forfeits them to the innocent party, though by the Roman, a ſatisfaction was given to the wilful author of the confuſion.

a prescription for things moveable and corporeal, and ten sufficed for things incorporeal and immoveable, if the persons prescribing inhabited in the same province; if in divers, twenty years.

The validity, however, of the prescription, *i. e.* whether it had been an uninterrupted possession for the three or the ten years, or whether it was a thing that could be prescribed for, might be tried in a real action, if brought within twenty, or a personal commenced within thirty. The allotment of periods for commencing these actions, corresponds with our statutes of limitation. The property even in things stolen, for reasons of general convenience, and public peace, was not controvertible at the end of forty years.

Every lawyer knows that our spiritual courts are prohibited from trying customs. The reason is, that being guided by the civil or canon laws, the first of which allowed ten years, the latter forty, to constitute a good custom, they would have adopted their precepts, and established customs as legal, though sanctioned by such brief duration.

Of title by deed, no other variation need be noticed except that delivery was not essential with them as with us; but the debt of our code to the civil, is most conspicuously shewn in the branch of title arising from contract, to which the civi-

lians have reduced almoſt every thing they have delivered on duties and rights. The obligation here is, indeed, ſo univerſal, we have ſo little of original fund, and the analogy is ſo complete, that we cannot be expected to mark diverſity, except in ſome very few inſtances. Theſe relate principally to the contracts of leaſing and mortgaging, and to the conſequence of certain contracts, viz. legal intereſt.

Leaſes for long terms were to them unknown, a ſpecies of intereſt which, though ſo frequent in this kingdom, is little uſed on the continent of Europe, and is ſurely not always eſſential to agriculture (3). It is even probable that they were unacquainted with irrevocable terms, and certainly the landlord claiming the farm or houſe leaſed, for his immediate occupation, had a right to reſume it. But if here our policy may ſeem wiſer, the civil law deſerves praiſe, when it allows for the leſſees loſſes by inundation, or any inevitable accident; whereas, with us, during the

(3) I mean, in countries where confidence ſupplies the place. Marſhall Rur. Œcon. Mid. Co. 2 vol. Min. 24. ſays, "It may be a moot point whether, under ſuch "confidence well placed, leaſes or no leaſes are moſt "eligible." Gibbon and Young lament their want in France and Switzerland: yet, ſurely, agriculture did not pine in thoſe countries. Picardy, when I ſaw it in 1779, before leaſes were much lengthened in France, was an ocean of corn.

term, as he is ſecure of all adventitious gains, ſo in ſeveral caſes he muſt bear the loſs (4). With reſpect to barring forcible entry, even of the landlord, and enforcing the right of reſumption for arrears due after certain intervals, both ſyſtems coincide. From the aſſertion that long leaſes were unknown to the Romans, muſt be excepted their Emphyteuſis, becauſe, though they expreſsly excluded it from the claſs of leaſes, it bears a ſtrong reſemblance to fee farm tenures; it was a grant of land in perpetuity, on condition of improvement, with reſervation of a trifling rent. It was made originally of barren land, to whoſe cultivation ſuch encouragement was neceſſary; and as it was legally forfeited, for non-performance of the inherent covenants, and yet might be equitably reſtored, on ſatisfaction for the breach, we may reaſonably conclude that the inventors of our leaſes for lives renewable for ever, drew their ideas from this ſource, on a tenure almoſt peculiar to this kingdom, as we know they certainly did on poſſeſſory bills, a mode of proceeding very uſual in Ireland. And hence the modern practitioner might poſſibly derive ſome uſeful principles of direction.

(4) E. G. Fire, and non-enjoyment in conſequence, no ſuſpenſion of the rent: however, a defence in an action of waſte. *Belfour* v. *Weſton*, 1 *Term Rep.* and ſee 2 *Stra.* 1163. 2 *Lord Raym.* 1477.

The power of mortgaging among the Romans was more extenſive than with us, ſince they could mortgage even things incorporeal, as debts and actions; whereas the rights to things, termed by the Engliſh law choſes in action, are not transferable, from apprehenſion that they might become inſtruments of oppreſſion in the hands of wealth and power.

Modern laws have a manifeſt preference, in invalidating unwritten mortgages; whereas, at Rome, the legaliſing parol mortgages, merely ſupported by three witneſſes, gave ſcope by antedating the conveyance, to iniquitous preference, and variety of fraud. It is true, the guilty deceiver was there liable to the action of ſtellionate or fraud, and in England loſes all benefit of redemption, againſt the ſecond mortgagee; but the regiſtry acts of this kingdom, and the edicts of France and Holland, requiring the perfection of mortgages before public and national officers, form barriers much more effectual.

The civil law was inferior to ours, in allowing the creditor to ſell the thing mortgaged by his own authority, after three notices to redeem, without obliging him, as we do, to appeal to ſome tribunal, which ſhall judge on the whole circumſtances of the caſe, whether ſuch alienation be conſcientious or neceſſary.

On the law of intereſt we have plainly reaſon on our ſide. The civil law did not totally prohibit intereſt, but only where the borrower had derived no advantage from the loan. But the confined bigotry of churchmen, in the middle ages, rejected intereſt altogether; and the diſtinction between intereſt and uſury, and the poſition that money might be hired at a price not exorbitant, like any other commodity, without crime or ſtain, could find no admiſſion into thoſe regions of darkneſs. The intereſted Lombard and the perſecuted Jew were the unpopular oracles of truths ſo plain, and their profane lips were ſilenced by the whole thunder of the Vatican.

Having diſcuſſed the nature and foundation of rights, as conſidered by each law, our natural progreſs is now to Remedies for Wrongs. The neceſſity of obliging every man to purſue his legal remedies in a certain order, and to faſhion them to ſome reaſonable ſhape, without which diſputes would find no iſſue, and ſuits wildly conducted, would terminate in endleſs confuſion, have induced all nations to adopt certain forms of actions. Theſe at Rome were long concealed by the profeſſors of the law, to enhance their conſequence, and aggravate their ſervices; but being at length divulged by Cneius Flavius, formed a valuable part of the advocates library, under the name of *Jus Civile Flavianum*, and raiſed its promulgator, though of mean extraction, to

the office of *Tribune, Senator & Cærule Ædile.* The Romans had their actions real, perſonal, and mixed, as many and various as with us, and adapted to each particular complaint. Churchmen, our firſt Juriſts, well acquainted with theſe precedents, transferred an ample ſtock into our own *Officina Brevium*, and able Judges from thence ſtruck light, which has illuminated remedial juſtice in modern days. The action of aſſumpſit, to avoid a tedious length of examples, may afford a conſpicuous inſtance. And thus the *actio quaſi publica* was the parent of our qui tam action.

Theſe remedies were purſued in various courts, and before ſeveral orders of Judges. The nature of theſe judicial tribunals is wrapt in much obſcurity, and the confuſion is increaſed by their applying the name of Judges indiſcriminately to the preſiding power that directed in point of law, and to the aſſeſſors who judged of the fact. Down even to later times, the parties are always ſaid to appoint their own Judges; and theſe *dicta* ſeem clearly applicable, not only to the Jury, if I may ſo call it, but to the court, a power ſo ſtrange as to be ſcarcely reconcileable to our modern notions of wiſdom and propriety, nor is it eaſy to conceive how Judges, thus choſen almoſt at random, ſhould have been endued with competent knowledge; or how this power, ſeemingly of the wildeſt nature, ſhould not have been productive of igno-

rant deciſion, and ſubverſive of regular precedent. Certain it is, however, from expreſs paſſages in the code, that before the time of Juſtinian, there were fixed and permanent tribunals; certain it is alſo, that they had diſtinct courts of law and equity. The doctrine of truſts contributed to this diſtinction with them as much as with us. On the doctrine of truſts, their law was fertile and prolix, and their *Prætor fideicomiſſarius* eaſily ſuggeſted to churchmen and civilians the idea of our modern Chancellor. Whether this diſtinction of courts has been, either among the ancients or moderns, wiſe, reaſonable, ſalutary, or neceſſary, has been matter of much celebrated controverſy between contending abilities of the firſt rank, and is a queſtion ſpread over fields of argument infinitely too ſpacious for the range of our preſent courſe.

It will not be denied that this diviſion of judicatures is attended with a certain awkward ſemblance of contradictory powers, and that, had it not been for the narrow deciſions of courts of law, the prætorian authority of Chancery probably never would have raiſed its head; but Chancery muſt either have aſſumed its authority, or the court of law muſt have occaſionally metamorphoſed itſelf into a court of equity, or ſomething not unlike it, a tranſformation liable to ſimilar objections. The change of incroachment on the legal juriſdictions, was prompted by ignorance,

or inſtigated by party (5); and the idea that this ſeparate and diſtinct power is arbitrary, undefined (6) or capricious, (though, to the ſurpriſe of Britain, it was ſo depicted by an eminent Northern Juriſt (7), who undertook to teach the Engliſh principles of equity), never had foundation, nor could have expected tolerance from an enlightened freedom, for a moment; it is a power to ſupply that which is defective, and controul the harſh and unintentional applications of general rules to particular caſes; it is not a power to make a new law, or diſpenſe with an old one. It cannot be better deſcribed than it is by the Roman Juriſts, *Juvare, ſupplere, interpretari, mitigare, jus civile, poteſt; mutare vel tollere non poteſt.*

To the Judges of their reſpective courts, as well as to the advocates who attended them, certain rules were applicable, ſome of which have been imitated by us, and others neglected. The incapacity of ſitting in judgment in the place or province of the Judge's nativity is the rule of their law, as well as of ours, and it may be

(5) From which imputation of party-ſpirit Lord Coke himſelf is not free.

(6) It is undefined in one ſenſe only, as the cauſes that arife before it may be infinite and indefinite, that is, not reducible to any ſet form of legal action.

(7) Lord Kaims.

hoped was better obſerved by them than by us. The regulation which commanded him to finiſh every criminal cauſe in two years, and every civil one in three, perhaps can only live under the meridian of an arbitrary government. But their rules with reſpect to advocates ſeem to have been admirably calculated to preſerve the decency and honour of the bar. Their names were expunged from the roll of honour, if they bargained with either contending party for any part of the matter in conteſt, or inhumanly refuſed to defend the accuſed pauper, at the nomination of the Judge. For railing, and abuſive language, they might be fined, ſuſpended, and removed. They went through a *real* examination for admiſſion, and might maintain an action for the honourable fruits of their labours. How far theſe regulations correſpond to ours, is obvious to every perſon in the leaſt converſant within the walls of the forum.

In both civil and criminal cauſes, the ſubſtantial parts were, the action, citation, libel, conteſtation of ſuit, anſwer of the defendant, the proofs, the concluſion, the ſentence, and execution. Accidental parts, contumacy, exception, replication, ſatiſdation, tranſaction.

The form of trial was that which has been handed down to us in the courts eccleſiaſtical and in Chancery. The advantage of that power,

which can demand the defendant's anſwer upon oath, is acknowledged by the ſuitor in equity, who finds ſuch aſſiſtance refuſed him by the limited hand of the common law. The written examination of witneſſes, though it diſcovers not the guilty forehead, nor the trembling hand, poſſeſſes that mature and ſolemn inveſtigation, ſeldom known to the hurry and confuſion of a trial by Jury.

In complicated caſes of property, therefore, many able men have thought this length of unhurried examination, infinitely preferable to that rapid torrent of captious interrogatories, which often derives credit to the advocate, from the confuſion of the evidence, without drawing a ſingle ſpark from the torch of truth, or adding the minuteſt weight to the arm of juſtice.

But in criminal proſecutions nothing can compenſate to the accuſed for the refuſal of liberty to meet the adverſary face to face, and to confront the man who aims a deadly dart at his life and at his character; this is one advantage—the other is trial by jury. Here then the law of England triumphs: before a jury of his countrymen and his peers, acquainted by their vicinage with his character, and intereſted from their equality in his protection; openly accuſed, and legally defended, the guilty alone can tremble at the incumbent hand of juſtice.

The learned Pettingal maintains that the Centumviri were a jury; but if his analogy be not fanciful, their utility was at leaſt confined to civil caſes, for we never hear of them as a bulwark to liberty, or a ſhield againſt oppreſſion. Indeed, the whole front of the Roman criminal law preſents nothing but odious lines of ſanguinary horrors, where every ſtep of the legiſlature can be traced in blood. The iron crown, the agonizing wheel, the bed of tortures, preſent themſelves to the abhorrent eye on every ſide; their ultimate puniſhments, ſavage in their nature, and foreign to their end (which is example, and not the pain of the individual), dilaceration by wild beaſts, protruſion from the Tarpeian Rock, immerſion, crucifixion, and ſcourging to death, are leſs ſhocking in narration to our feelings, than the previous engines uſed to extort confeſſion from the priſoner, and to load with guilt the unfortunate object of Imperial reſentment.

The Inquiſition, a name now almoſt configned to the regions of Iberia, was the title of a proceeding familiar to the Romans. The long diſquiſitions in the digeſts on the ſubjects and incidents to the rack or queſtion, are too repugnant to humanity to bear analyſation. The oath *ex officio*, which, in contradiction to every principle, compelled the priſoner arraigned to accuſe himſelf, and which long roused the juſt reſentment of theſe realms (until baniſhed, with univerſal

acclamation, at the Reſtoration), took its riſe from the ſame deteſted font. There is ſcarcely an abuſe of the criminal law, which in the laſt or preceding centuries drew down on its perverters the vengeance of an injured people, that was not ſuggeſted by the deſpotic genius of declining Rome.

Yet, amidſt theſe ſeverities, we are ſurpriſed to find glimpſes of indulgence unknown to us, ſuch as delivery of a copy of the indictment or charge to the accuſed in all caſes, the refuſal of which, however ratified by time, did always, in my opinion, caſt upon our juriſprudence the complicated ſtigma of harſhneſs and abſurdity (8). Privileges, ſimilar to thoſe of the *Habeas Corpus* act, had early exiſtence at Rome, and indefinite impriſonment without trial was unknown. In ſome inſtances, a violent revolution to clemency, even favoured of the Moſaic rules of compenſation, and refuſed to puniſh theft with death until the days of Juſtinian.

Here, however, upon the whole, is the glory of Britain and of Ireland; and though we muſt

(8) This opinion is ſupported by the author of the Preface to the Second Edition of the State Trials, juſtly admired by Mr. Hargrave: he ably anſwers the objection that it would give room for captious exceptions. If they are really captious, they ought to be diſallowed; if they go to the merits of the cauſe, why ſhould not the priſoner have the benefit of them?

recollect that counſel, by the common law, is denied to the culprit, and that it was only in the century before the laſt that he was allowed to produce a witneſs; yet it is our happineſs to reflect, that the errors of our anceſtors are almoſt matters of hiſtoric curioſity, or at moſt, lights on a diſtant ſhore to guide our paths to peace and ſecurity. The trial by jury, while preſerved inviolate, is a palladium which will for ever ſecure us from a repetition of encroachments. May it be our pride to guard its ſacred rights, and preſerve its avenues from pollution. And if no other utility was derived from the ſtudy of the civil law, but the ſatisfaction of obſerving, in triumphant contraſt, the ſuper-eminent attention which ours has paid to the rights of the ſubject, it would be a recompence to the philoſophic ſtudent, and ſincere lover of his country.

RIGHTS OF PERSONS.

PREFATORY REMARK.

THIS work proceeds at once to the rights and duties of perſons, in their private relations, omitting thoſe which aroſe at Rome; from the public relations of magiſtrates and people, the latter being well known to the theoretic ſcholar, and to the practiſing lawyer now of little or no concern, except to warn him of the ill uſe formerly made of them, to ſupport ſhip-money, diſpenſing power, &c.

ON THE CIVIL LAW.

BOOK I.

OF THE RIGHTS OF PERSONS.

CHAPTER I.

HUSBAND AND WIFE.

THOSE branches of the civil law, to which modern inſtitutions bear no analogy, and which therefore only tend to ſatisfy curioſity, or illuſtrate hiſtory, may be here treated in a more ſlight and general manner. Such, for example, are ſervitude, paternal power, and adoption; but where the rules of the Roman code have given riſe either directly, or by analogy, to the regulations of our laws, or where they form the law and practice either of our maritime or eccleſiaſtical courts, I muſt beg leave to unfold them more minutely and in detail. This is peculiarly the caſe on the ſubject to which we now proceed, the relation between huſband and wife, the contract of mar-

riage. In many inſtances the law of marriage, both in our temporal and eccleſiaſtical courts, is derived from the Roman inſtitutions; indeed, in moſt, except where the precepts of our holy religion have interfered, and forbade the admiſſion of rules contrary to its purity. The ſubject is the more important to the civilian, becauſe it conſtitutes one grand diviſion of thoſe cauſes which come under the cognizance of the ſpiritual courts, which are (except thoſe which are merely *pro ſalute animæ*) divided into pecuniary, teſtamentary, and matrimonial (1).

Marriage is conſidered in various lights by different laws. The Roman had reſpect principally to its civil effects, as it produced in the huſband and wife a mutual participation of benefits and right; it was therefore defined, *omnis vitæ conſortium, humani & Divini Juris communicatio.* I do not mean that the Romans omitted all religious rites on the perfection of this contract, but their laws viewed it merely as a civil covenant, however Heaven might preſide over its ratification. Thoſe rites were not any part of its eſſence; it was good without them. The canoniſts conſider it in a religious light, and

(1) It may ſurpriſe the peruſer of the Inſtitutes of Juſtinian to find ſo important a ſubject there ſo ſlightly touched upon; the reaſon is this, the Emperor in the Inſtitutes merely introduces it collaterally as one of the foundations of paternal power.

define it a ſacrament peculiar to the laity, by which a man and woman are joined together according to the precepts of the church. Among proteſtants it is conſidered, partly as a holy union of Divine inſtitution, partly as a civil contract; in the latter view alone it is regarded by the temporal courts; its ſacred bonds being left entirely to the guardianſhip of the ſpiritual tribunals.

I ſhall firſt conſider how marriages were created at Rome; ſecondly, the effects of this relation; thirdly, how they were diſſolved; marking, as we proceed, how the different views of it above-mentioned have occaſioned the canon and our law to differ from theirs.

With reſpect to the firſt head, how marriages were contracted—in this, as in all other contracts, the parties muſt, by the Roman law, as by ours,

First, be willing to contract.
Secondly, able to contract.
Thirdly, muſt actually contract.
Fourthly, to *produce certain legal effects*, the marriage muſt have been actually celebrated with particular rites and ceremonies, which, however, were not part of its eſſence, nor requiſite to make the contract complete, as they are with us.

First, Willing—It is evident that free conſent is neceſſary to conſtitute a valid marriage; it

would be flagrantly abſurd to allow the brutal raviſher to form, by acts of violence, an indiſſoluble union. The maxim therefore of the Roman law, as well as of ours, is, *Conſenſus, non concubitus facit nuptias*; if then error, fear, or force intervened, the marriage was void, becauſe conſent, which is eſſential to it, was wanting. But as it would be much too general a poſition to ſay, that all error vitiated a marriage, it may be uſeful, by one or two examples, to point out what manner of error was fatal. An error in the perſon vitiated the marriage, *e. g.* if we ſuppoſe one of the parties drawn by ſome diſguiſe or deception into a contract with a perſon they did not intend, and whom they miſtook for another; an error in an eſſential quality was fatal, as *e. g.* with reſpect to impotency (2) or affinity: an error in an accidental quality was not; for inſtance, in fortune or temper (3): for weak indeed would be the nuptial tie, if liable to be broken on account of imperfections diſcovered after marriage,

(2) This objection is conſidered, by Mr. J. Blackſtone, under the head of Diſabilities. The reader here will obſerve, that though the general claſſification correſponds with that of the learned profeſſor, there is no ſimilitude in the arrangement or ſucceſſive order of the inferior points. *E. g.* Again, idiotiſm, claſſed by him as a diſability, is conſidered by the civil law under want of will, and the diſtinction of diſabilities into thoſe attended or not attended with turpitude, is not uſed by Blackſtone.

(3) The French have made temper a cauſe of divorce.

and miſtakes with reſpect to fortune, if not occaſioned by fraud, deſerve no pity; if attended with fraudulent circumſtances, can only furniſh a ground for pecuniary compenſation.

On this head of error the laws of theſe countries do not differ from thoſe of ancient Rome (4). Of marriages diſputed on account of alledged error in the perſon, (though ſuch an event, however frequently made an inſtrument of the drama, ſeldom occurs in real life), an inſtance has occurred within my own experience; errors in eſſential qualities, even if we can ſuppoſe the parties willing, operate as diſabilities, and make the marriage voidable; and errors in accidental affect not its validity.

An error occaſioned and produced in one party by the other, in order to break the marriage, ſhall not avail the deceiver, ſuch as miſnaming himſelf or herſelf, unleſs where the error reſpects ſome diſability (as conſanguinity), or occaſions the omiſſion of ſome requiſite expreſsly inſiſted on by the poſitive law; for example, that of the perſon celebrating the marriage being a clergyman in holy orders; but when the ſpiritual courts in England were allowed to enforce contracts *in præſenti*, which they could until the marriage act, (and no ſuch act having paſſed in Ireland (5), are ſtill

(4) To the errors in eſſentials above-mentioned, the Moſaic law added an error in reſpect to virginity.

(5) This difference between the laws of the two countries is worthy of obſervation.

allowed to do in that country, where there is no ſubſequent marriage with conſummation) it would ſeem that if the marriage had been celebrated by a layman diſguiſed as a clergyman, the judge ſhould have decreed a celebration *in facie eccleſiæ*, becauſe, though not properly a marriage, it was a contract *de præſenti*.

The conſent muſt be given without fear; but under the name of fear is not comprehended filial reſpect and reverence, inducing the child to pay attention to the wiſhes of the parents, if on their parts there be no force, perſonal violence, or menaces: if it be a fear, according to the language of the civil law, *a quo abſunt verbera, vincula, minæ*, it muſt not be forced: hence marriages celebrated by force are void; and by the civil law, the conſent of a party forcibly carried away from the family and married, whether given precedently or ſubſequently, did not confirm the marriage; by our laws, a precedent conſent (in ſuch a caſe), in ſome inſtances, does not confirm the marriage; a ſubſequent in ſcarce any: but this diſability in the perſons carried away, to ratify ſuch forcible marriage by their conſent, depends on particular ſtatutes, and is confined to the caſes mentioned and deſcribed in thoſe ſtatutes (6).

(6) The principal of theſe ſtatutes are,

in England,	in Ireland,
3 Hen. VII. ch. 2.	31 Hen. VI. ch. 9.
39 Eliz. ch. 9.	3 Hen. VII. ch. 2.
4 & 5 Ph. and Mary, ch. 8.	10 Car. I. ch. 17.
	6 Anne, ch. 16.
	19 Geo. II. ch. 13.

Proſtitutes, by the Roman law, were not entitled to this protection from force; but our laws, regarding the rights of humanity, as well as the public order and peace, have given them in this reſpect the ſame immunities with other women.

Under the head of marriages void for want of conſent of parties, may be included thoſe of idiots and lunatics, who, having no free will, are incapable of conſent, and were therefore, by the civil law, incapable of contracting matrimony. By the old common law of England, idiots and lunatics were abſolutely permitted to marry; but by the Engliſh ſtatute, 15 Geo. II. ch. 30. the marriage of a lunatic, found to be ſo by virtue of a commiſſion, or whoſe perſon and eſtate are by act of parliament entruſted to others, *is in that kingdom* declared to be null and void (7); and in Ireland, the marriage of a lunatic, if not proved to be in a lucid interval, would be determined to be void.

Secondly, Able—Now let us ſuppoſe the parties willing, we proceed to the cauſes which may diſable them from contracting; theſe were divided by the civil law into ſuch as were attended with turpitude, and ſuch as were not. Under the former claſs of thoſe free from turpitude, they reckoned

(7) This act is ſometimes called the Bradford Act, as ſaid to have been introduced by Mr. Pulteney, to prevent Lord Bradford, to whom he was next in remainder, from marrying.

infancy—want of proper conſent—alienage. Under the latter, ſuch cauſes as rendered the marriage inceſtuous, indecorous, or noxious. We ſhall conſider them in this order:

1ſt. Infancy—By infants, in the civil and eccleſiaſtical laws (in relation to marriages), are meant children under the age of ſeven (8). Such could not even contract eſpouſals (9); between the age of ſeven and puberty, which, by the civil law, as by ours, was fourteen years in the man, twelve in the woman, they might contract eſpouſals, *i. e.* make contracts *de futuro*, or mutual promiſes of future marriage, but not marriage contracts *de præſenti*, or by words of the preſent tenſe.

At the age of puberty they might agree or diſagree to the contract by marrying or refuſing to marry; ſo they might if one only of the parties were under the age of puberty, on that party's arriving at ſuch age. The canon law reſpected hability, not years, in determining who were of the age of puberty, which therefore, according to the canoniſts, muſt differ in different perſons. If perſons under the age of puberty married *de*

(8) With reſpect to other acts and powers, infancy had other meanings, lengths, and periods.

(9) The marriages of princes were excepted for reaſons of ſtate. Swinburne, in his Travels, mentions having ſeen, at Palermo, two young ladies of eight years of age, who had been even then eſpouſed or betrothed, appearing at balls with their future huſbands.

facto at Rome, the wife was conſidered only as a ſpouſe; the huſband could not ſue for her dower; if repudiated, ſhe had not the *actio rei uxoriæ*, nor could ſhe upon this event recover a legacy bequeathed to her, to be paid at the time of marriage.

Our law here differs from the civil. A contract *de futuro* is of no force, if both the parties are under the age of twenty one years (10); if one only a minor, is voidable at the election of that minor; it differs again in this, that with us marriages *de facto* with perſons under the age of puberty, are conſidered as more than ſpouſals, as actual marriages; for though either party, on coming to the age of puberty, may diſagree to the marriage, yet if there be no ſuch diſagreement, no ſecond celebration of the nuptials is required; if indeed one of the parties diſagrees, the marriage is void without any ſentence of divorce (11). Such caſes in latter times have rarely happened; but formerly queſtions have ariſen, whether theſe marriages, notwithſtanding diſagreement, ſhould not be conſidered as valid with reſpect to third perſons (12).

(10) Holt *v.* Ward. Strange.

(11) Godolphin, p. 479.

(12) *Vide* Leigh and Hanmer, Leonard 53. The caſe was thus: a bond was given by Leigh, conditioned that his ſon ſhould marry Sir Thomas Hanmer's daughter; they intermarried, the ſon being twelve, the daughter nine; Leigh's ſon at fourteen, his age of puberty, diſagreed to the marriage. An action was brought on the bond; adjudged that

2d. Disability—Want of consent of parents or guardians. No consent was wanting but that of the parties themselves by the canon and our common law; for though, by the feudal system, the want of consent of the King or Lord subjected the party to forfeitures, yet that did not invalidate the marriage. In the civil law the consent of the father was indispensably necessary to the validity of the marriage, until the child was emancipated; hence great difficulties arose when the father was insane, in captivity, &c. till by later regulations the magistrate had a power in such cases to dispense with the necessity of consent (13). In some

its condition was fulfilled, and that the marriage under puberty, though the parties had a power of afterwards disagreeing, was thus to be considered a good marriage as to third persons.

(13) The necessity of parental consent is agreeable to reason, otherwise filial irreverence is encouraged, and rash and imprudent connections follow, attended with misery both to parent and child. It is also agreeable to the Divine law, which makes marriages without such consent voidable. Isaac, Jacob, Sampson, Exod. xxii. v. 17. Though a man seduced a maid, the father might refuse her to him, ergo a fortiori, &c.

Deut. vii. v. 3. The Israelites were forbidden to give their children in marriage to the children of Canaan.

1 Corinth. ch. vii. St. Paul speaks of persons giving or refusing their children in marriage.

Yet the Council of Trent severely condemned those who hold that marriage without consent was voidable; and many writers on the canon law have maintained, that such consent, though decorous, is not essental to the *ratification of the marriage by that law.*

caſes, for want of a father, the conſent of mothers or guardians was required. If conſent was unreaſonably refuſed by the father, there was no remedy; if by the mother or guardian, the magiſtrate had a power of interference, and might allow the marriage. In Holland the conſent of parents or guardians is neceſſary to twenty-five. In France until thirty. The legiſlature of England in later times has adopted the ſame policy, and by various ſtatutes has made the conſent of parents or guardians, until the parties are twenty-one, an indiſpenſable condition to a good marriage. Hence in England the age of twenty-one is become the full and perfect age, in reſpect to marriage, as it always was with reſpect to many other acts. Of theſe Engliſh ſtatutes, the principal is uſually known by the name of the Marriage Act, 26 Geo. II. which never was enacted in Ireland, but certain acts have paſſed in that kingdom, particularly 9 G. II. ch. 11. and 23 G. II. ch. 10. to invalidate by ſuit in the eccleſiaſtical court, (to be commenced within a year) the marriages of perſons *having eſtates to a certain amount* therein ſpecified, who marry under twenty-one without conſent of parents or guardians. The Iriſh canons require their conſent in all caſes where the parties are under the age of twenty-one, and at any age if they are married by licence (14), except in caſe of widowhood.

(14) The propriety of the Engliſh Marriage Act has been a ſubject of great controverſy: againſt it was urged the de-

3d. Diſability—The parties not being Roman citizens. This followed from the Roman definition of marriage, and the light in which they conſidered it; for how could others participate all rights, divine and human, when none but Roman citizens were entitled to thoſe full and complete privileges? The participation of divine rights was of great conſequence to a Roman wife, *e. g.* her being admitted to the ſacrifices offered by the huſband, while the empire continued to be heathen,

creaſe of population and licentiouſneſs which it would occaſion. It was anſwered, that parents were not apt to refuſe their conſent to reaſonable matches, but muſt wiſh to ſee their children ſettled; that any perverſe oppoſition from the parent could only retard the marriage until twenty-one, no great age for entering into that union; and that haſty marriages do not tend to make the people happy, or the nation proſperous, or add to the felicity of either children or parents.

This act is ſuppoſed not to extend to Scotland, but Lord Mansfield expreſſed great doubts upon that point.

However, Mr. Hargrave ſays this point ſeems now fully ſettled in favour of Scotch marriages by a deciſion in the court of arches, afterwards confirmed by the delegates in that kingdom.

It is ſaid to be rendered totally nugatory by having the banns called in a pariſh where a party has reſided a certain time for the purpoſe, but where, notwithſtanding ſuch reſidence, the banns may be called without the knowledge of any parties concerned to prevent it; for this trick is ſaid to be a ſecurity from the act.

The Royal Marriage Act, 1772, is alſo ſometimes emphatically called the Marriage Act.

because without such participation there were many civil rights to which she was not entitled. Marriage with them meant the union of persons entitled to every right that human nature is capable of; hence the union between citizens was called Nuptiæ or Connubium;—with other free persons, Matrimonium;—and between slaves themselves, Contubernium. Vide Heineccius.

Having now gone through the disabilities, which are merely temporal, or not attended with turpitude, we proceed to such as are, or at least have been, so accounted. Marriages forbidden by the civil law, on account of the latter, are classed under,

1st. Incestuous,
2nd. Indecorous,
3d. Noxious.

Incestuous.—In order to understand how far the disability arising from consanguinity or affinity has been extended by different laws, we must trace out their respective methods of computing the degrees (15) of kindred among collaterals (16). The civil law reckons upward (17), from either of the persons related, to the common stock, and then

(15) Gradus est Distantia Cognatorum.

(16) It is evident the degrees of kindred, in the right line, must by all laws be reckoned alike—*i. e.* as many degrees as there are generations.

(17) This was the Jewish mode of computing, and is the fair and natural one, says Bacon, Ab. 3 vol. p. 572.

downward again to the other; reckoning a degree from each perſon to the next, both aſcending and deſcending.

The canon law (18) begins at the neareſt common anceſtor, and counts downward; and in whatſoever degree the two perſons, or the moſt remote of them, is diſtant from the common anceſtor, that is the degree in which they are related to each other. E. G. couſin germans are, by the civil law, in the fourth degree to each other; by the canon law and by ours in the ſecond degree. This being premiſed, the rules of the civil law are eaſily underſtood, and may be reduced to *two*.

Firſt, Marriages between perſons in the direct line, whether aſcending or deſcending, are prohibited *ad infinitum*.

Note.—*This rule is common to the three laws.*

Secondly, In the oblique equal line, (*i. e.* if both perſons are equidiſtant from the common ſtock,) the ſecond degree is within the prohibition, the fourth not. In the oblique unequal line (*i. e.* if one be more remote from the common ſtock than the other,) all degrees beyond

(18) The rule of the canon law is thus expreſſed:

Linea tranſverſa æqualis.

In Quoto Gradu unuſquiſque diſtat a Stipite; eodem inter ſe diſtant.

Linea tranſverſa inæqualis.

In Quoto Gradu Remotior diſtat a Stipite; eodem diſtant inter ſe.

the third are legitimate degrees, unleſs one perſon be *in loco parentis* to the other (19). There are no degrees of affinity, in propriety of ſpeech, becauſe no generations of blood; but, by analogy, a rule is applied to them, viz. in whatever degree any perſon is related to me by blood, in the ſame degree is the conſort of that perſon related to me by affinity (20).

The canoniſts, eager to augment the reſtraints upon marriage, in order to increaſe the neceſſity of diſpenſations, were not pleaſed with theſe rules, or with the civilians' method of computing degrees. They therefore adopted the method of computation mentioned above, which brought all perſons within nearer degrees of kindred than before, and extended their prohibitions to the fourth degree, in the equal collateral line, and even further in the unequal. Not content with theſe alterations, they invented new reſtraints, ariſing from ſpiritual relationſhip, *i. e.* from having the ſame godfathers or godmothers, and extended their prohibitions to the ſeventh degree

(19) By perſons *in loco parentis* to us, the Roman Law meant perſons nearer the common ſtock than we are.

(20) Yet ſome exceptions; by theſe rules couſin germans might marry, yet often forbidden by the Emperors before Juſtinian. A man might marry his niece, not his aunt. Yet the niece was prohibited after the time of Conſtantine, I ſuppoſe for being within the levitical degrees.

of this relation, until the council of Trent reſtricted the prohibitions of marriage, ariſing from baptiſm, to the ſecond degree.

Although in theſe countries the method of the canoniſts in computing degrees is adopted with reſpect to real eſtates, and that of the civilians as to perſonal, yet neither are applied to the diſabilities of marriage. A ſtatute of Hen. VIII. which is in Ireland, 33 cap. 2, has ordained that no degree of kindred ſhall be a prohibition to marry, except ſuch as is made prohibitory by God's expreſs law, or ſuch as comes within the ſame reaſon. The degrees of kindred therefore, to which we are to look, to know whether marriage be prohibited on account of conſanguinity or affinity, are the levitical degrees. The inability to marry perſons who are *in loco parentum*, does not exiſt with us (21).

Marriages were prohibited by the civil law as indecorous, 1ſt between ſenators and emancipated ſlaves, or other perſons of mean condition. 2d, Between a man, and a woman who was an actreſs, a proſtitute, an adultreſs, or who had been convicted of heinous crimes. 3d, Between parties who had committed adultery to-

(21) A man had married his great uncle's wife; a libel was exhibited againſt him to annul the marriage. Prohibition was obtained, for it is within the levitical degrees; yet ſhe was to him *loco parentis*.

Dr. Harriſon *v.* Burwell, Vaughan.

gether (22). 4th, Between the raviſher and the raviſhed. The firſt prohibition as to ſenators, however, was taken away by Juſtinian. The ſecond and third are unknown in the canon law, or in our common law.

Noxious—Firſt, marriages were prohibited among the Romans as noxious, between Chriſtians and Jews. To this, forbidding the intermarriages of proteſtants and papiſts, may bear ſome compariſon as to their policy.

Secondly, Between guardians or their ſons, and their female wards, before they have rendered an account, and between provincial governors, or other public officers in the provinces, and provincial women (23).

Thirdly, The marriages of the clergy, or others who had made a vow of chaſtity. But this muſt be confined to marriages ſubſequent to their entering into the miniſtry, for marriages contracted before, were not, by the civil law, diſſolved on taking orders, and thoſe in the *lower* orders might marry *once* after being ordained. *See Code, lib.* 3. *tit.* 19.

Fourthly, Between perſons who, or one of whom, were married already to ſome other, ſtill living.

(22) This, though often ſpoken of in the houſe of lords, never has been enacted in theſe realms.

(23) Compare with this policy, the ancient laws forbidding marriages between the iriſh and engliſh.

By the civil law, polygamy is expreſsly forbidden. In theſe countries a former marriage not only invalidates a latter, but ſubjects the party to the penalties of felony, unleſs there has been a precedent ſeparation *a menſa & thoro*, which, though it does not confirm the ſecond marriage, prevents the felony. At Rome frequent attempts were made to aboliſh the laws againſt polygamy, but without ſucceſs. Julius Cæſar entertained ſuch a deſign, but did not carry it into execution. Valentinian I., wiſhing himſelf to take a ſecond wife, allowed the practice though it had ceaſed to be common. Juſtinian forbad it expreſsly among the Romans; and Theodoſius, Arcadius and Honorius, extended the prohibition to the Jews (24). Among modern civilized nations, polygamy has ſcarce ever been legalized, not even in Muſcovy: Charlemagne, at that early period, puniſhed it as adultery. It is remarkable, that the Mahometans, at preſent, though they practice it themſelves, are ſaid to forbid it to the Jews (25).

(24) Among the ancient nations, the Perſians, Athenians, Parthians, Thracians, practiſed polygamy.

(25) This practice has been defended by appealing to the practice of the patriarchs, particularly Lamech, and of the whole jewiſh nation. But, ſays St. Auſtin, what is that to us; we are forbidden by the poſitive revealed law, they were not. Beſides, others maintain that Lamech was ſeverely reproached by his conſcience for this act; and if it was indulged to the Jews at all, it was rather permitted to the hardneſs of their hearts, than encou-

It is not wrong, ſay the polygamiſts, becauſe it is not contrary to the end of marriage, which is encreaſing the ſpecies. This is not conſonant to experience, for it is not found to encreaſe population. Turkey is an inſtance (26).

It has alſo been defended as neceſſary in hot climates. The roman law giver did not think ſo, for he enacted theſe prohibitions for the meridian of modern Turkey. A defence of the practice has been lately attempted by a doctor Madan, whoſe work has not even the merit of novelty; the ſame notions having been broached long before by Lyſerus, a native of Saxony, who wrote about 1683. Succeſſive polygamy (27) ſubjected perſons at Rome to ſeveral penalties and incapacities. By the canon law it is eſteemed indecorous, but not forbidden. Marriage within the year of mourning is ſeverely condemned by both.

raged, as was the caſe with reſpect to their divorces. Vid. St. Matthew, ch. 19. v. 8. Texts quoted againſt it are, from Geneſis, ch. 2. v. 18. where two only were joined together, &c. and 1 Corinth. ch. 7. v. 2. Let every man have his own wife, and every woman her own huſband. Arguments againſt polygamy, from the confuſion it introduces into families—from the neglect of the childrens' education, &c.—See alſo, Vinnius, p. 49.

(26) China ſeems an inſtance to the contrary.

(27) By ſucceſſive polygamy is meant, a ſubſequent marriage after the death of the firſt conſort.

I have now gone through the cauſes which, according to the civil law, rendered perſons unable to contract marriage; and have claſſed them as that law does, under ſuch as are attended with turpitude, and ſuch as are not. The more uſual diviſion of theſe diſabilities in the engliſh law is, into canonical and temporal. The former are conſanguinity, affinity, impotency and precontract. Theſe render the marriage voidable by ſentence of the ſpiritual court, if paſſed in the life-time of the parties, but not after. The latter render it *ipſo facto* void, and are, want of age, prior marriage, idiocy or lunacy, want of conſent of parents or guardians (28).

(28) This diſtinction between marriages void and voidable, not having been ſufficiently, in my opinion, explained by rudimental writers, not excepting even the two learned writers who have filled the vinerian chair, I will beg leave here to inſert my ideas on the ſubject.

Void and voidable marriages differ little as to their effects, when the latter is actually avoided; for example, if a marriage be avoided, as being within the levitical degrees, or of a minor, having a certain fortune, under the ſtatute in this country, the ſentence has a retroſpect, and makes it void *ab initio*; but if no ſuch ſentence during the life of the parties, in the firſt caſe, or within a year in the other, the marriage is good, and never can be avoided afterwards. It is, therefore, until ſentence, a marriage both *de facto* and *de jure*; and ſo for ever if no ſentence within thoſe limited times; but a ſentence, if paſſed within thoſe periods againſt it, has a retroſpect, and totally deſtroys its *de jure* effects from the beginning; it is in its origin *de jure*, and

We now proceed to the third grand requiſite to a valid marriage, viz. that the parties ſhould actually contract; under which head comes alſo the conſideration of precontract: theſe contracts naturally divide themſelves into contracts *de præſenti*, and contracts *de futuro;* the former, in the roman law, made and formed actual marriages, though of the unſolemn ſort, without any actual ceremony neceſſarily attendant on them. The latter, being promiſes of future marriage, were uſually

may for ever be ſo, or, *e contra*, all its *de jure* effects may be deſtroyed *ab initio* by a ſubſequent ſentence.

To explain—The iſſue of perſons marrying, though within the levitical degrees, are legitimate, (a *de jure* effect) if no ſentence during the life of the parties; if there be ſuch ſentence, are baſtards. Now mark the difference of a void marriage, as *e. g.* for bigamy or idiotiſm; it never was *de jure*, it was void *ab initio*, the ſentence does not *make* it void *ab initio*, it only declares it to have been ſo; in theſe caſes, therefore, a ſentence is not neceſſary; *nor do I think it more ſo in caſes of marriages by force and compulſion, however it may be prudent, though Mr. Woodeſon ſeems of a contrary opinion.*

Lord chief juſtice Hale ſays, the ſentences of the eccleſiaſtical courts do ſometimes introduce a real effect, without any other execution; as a divorce a vinculo matrimonii for conſanguinity, or frigidity, doth *induce* a legal diſſolution of the marriage, ſo a ſentence of deprivation from an eccleſiaſtical benefice doth, by virtue of the ſentence, without any other coercion or execution, introduce a full determination of the intereſt of the perſon deprived. *Hiſtory of the Common Law, p.* 33.

attended with the depoſit of an *arrha*, or earneſt, which, on breach, was forfeited (29).

The canon law conſidered them with a more curious eye, (and as contracts *de præſenti* were preſent matrimonial agreements, wanting nothing which the parties could contribute to form a marriage, but not celebrated by a prieſt) it conſidered them as marriages in conſcience, and compelled a celebration in *facie eccleſiæ*, extending the ſame privilege to contracts *de futuro*, if followed by conſummation. Theſe rules of the canon law were early adopted in England, and precontracts, ſo circumſtanced as above, invalidated future marriages. The law in this reſpect in England underwent various changes, until ultimately the marriage act forbad the enforcing of any ſuch contracts; and thus, by implication, aboliſhed the impediment of precontract. We have not that act in Ireland, but we have an act, 12 Geo. I. ch. 3. which enacts, that no contract without conſummation, ſhall be of any force towards making void a ſubſequent marriage conſummated.

Ultimately, the mere conſent at Rome made a marriage, without any outward ceremony what-

(29) Promiſes to marry are alſo the ſubjects of actions in temporal courts, but muſt be diſtinguiſhed from promiſes in conſideration of marriage, as to pay money, &c. theſe latter, by our ſtatute of frauds, are invalid, unleſs in writing, and ſigned by the parties, or their agents, properly authoriſed. Statute of frauds is, in Ireland, 17 W. III. ch. 12.; in England, 29 Car. II. ch. 3.

ever; yet, to produce certain legal effects, the marriage muſt have been celebrated with certain forms and rites, or eſtabliſhed by time; ſuch marriages were called ſolemn (30), and were of three kinds, confarreation, coemption, and uſe: confarreation was attended with ſacrifices, and *eating in communion of the ſame bread*, in preſence of a pontiff, or flamen dialis, and ten witneſſes; it was the moſt ſolemn and religious form, and the woman thus married partook of all her huſband's fortunes and ſacrifices; it was in the earlier times common to all, but afterwards confined to prieſts and pontiffs only, or thoſe whoſe children were deſtined for the prieſthood; it ceaſed to be commonly uſed about the time of Tiberius. *Coemption* was a fiction whereby the parties were ſuppoſed to purchaſe each other, and each of them laid down a piece of money for that purpoſe before prieſts and witneſſes; hence, the concubine, who was not an harlot, but a kind of inferior wife, (like the wife *a main gauche* in Germany (31), was called *uxor gratuita*, as not being married by

(30) Theſe ſolemn marriages were properly *nuptiæ*, though that word ſometimes ſignifies the nuptial banquet. Taylor diſtinguiſhes it from *matrimonium*, differently from Heineccius.

(31) This marriage, called *morganatic* in Germany, is when a noble perſon marries a perſon of inferior condition; her children do not inherit, but her character is unſpotted, and her huſband obeys the impulſe of his love without ſacrificing his pride.

coemption or purchaſed. 3dly. Uſe or cohabitation, which, if continued for a year, *mariti animo*, conſtituted a ſolemn marriage. Before the year ended, the wife was *matrona*; afterwards, *mater familias* (32).

In all theſe ſolemn ways of marriage, the wife was ſaid *in manum convenire*, that is, the huſband acquired a power very ſimilar to the paternal, both as to her perſon and eſtate, which became ſo diſtaſteful to women, that latterly they fell into diſuſe, and mere conſent (which was to be gathered by any concluſion that could be made) without any rite or ceremony, was the uſual method; wives, therefore, to avoid the ſolemn effects of cohabitation, contrived to be abſent three nights in each year, for a marriage was not effected by uſe in leſs than a year, and that uninterrupted for more than two nights. So that marriage by uſe, Dr. Taylor truly obſerves, was like taking on trial, or being upon liking, until ratified by a year's cohabitation.

(32) This is commonly ſaid to be the law of Scotland, but I think it ſafeſt to tranſcribe the words of one of their legal writers; "Marriage in Scotland is fully perfected by conſent, which, without conſummation, founds all the conjugal rights and duties."—*Erſkine, book* 1. *tit.* 6. *ſec.* 2.

It is not neceſſary in that country, that marriage ſhould be celebrated by a clergyman, the conſent of parties may be declared before any magiſtrate, or ſimply before witneſſes; and though no formal conſent ſhould appear, marriage is preſumed from cohabition.

It remains to note ſome ceremonies which attended the actual marriage among the Romans. The bride's hair was dreſſed after the manner of the veſtals; a yoke was put round the necks of the married couple, whence *conjugium*; a ring was ſent to the bride; the bride was torn from the mother, who made a feigned reſiſtance, in memory of the rape of the Sabines; ſhe was then carried to the huſband's houſe, *domum deducta*, the friends ſinging before her, *Hymen, O Hymenæe*; at the portal, fire and water were preſented to her, intimating that ſhe muſt ſhare her huſband's fortunes and ſacrifices; ſhe was then, with certain rites, made participator of the protection of his lares and penates, which was called *Sacrorum Communio*, and which gave an inheritance in, and a right of ſucceſſion to, his ſacred rights, and almoſt, by neceſſary conſequence, to thoſe which were temporal; and hence, as the lares could not be moved, the *domum deductio* (33) became a neceſſary part of the rites and cuſtoms, from whence the man was ſaid *ducere uxorem*, as the woman *nu-*

(33) The *domum deductio*, was the only ceremony of old in England; before the time of Innocent III., there was no ſolemnization of marriage in the church, but the man came to the houſe where the woman inhabited, and *led her home* to his own houſe. See Moor, 170.

In Scotland they have the marriage by uſe; living together as man and wife, or declaring themſelves ſo before witneſſes, makes a valid, though informal marriage. It need not be celebrated by a clergyman.

here. Whoever wiſhes to know more of this ceremonial, muſt conſult Heineccius, Teraſſon, &c.

Theſe ceremonies of courſe ceaſed after the empire became Chriſtian; but it does not appear that they were ſucceeded by celebration by a perſon in holy orders, for marriage, as is obſerved in the foregoing note, was not celebrated by the clergy till the time of Innocent III.; until that time, therefore, mere conſent and contract, to be collected as was ſaid above, from variety of circumſtances, made a marriage.

Let us now ſee what circumſtances are required (beſides an actual contract *between* parties willing and able to contract) to the validity of a marriage by the laws of England and Ireland.

Marriage muſt be preceded by a publication of banns, or by a licence obtained (34); and muſt be performed by a perſon in orders, in a pariſh church or chapel, unleſs by a ſpecial diſpenſation, and *during* the canonical hours, *i. e.* between eight and twelve in the forenoon.

The omiſſion of any of theſe requiſites, except that which relates to canonical hours, is made

(34) Before the granting of *any* licence, ſay the letter of the canons, two known perſons muſt ſwear to parents conſent; hence I have ſaid above, it is requiſite at *any* age to a marriage by licence; but from the general context of the canons, it is natural to ſuppoſe, their ſpirit extended only to perſons under twenty-one; one of the parties alſo muſt ſwear there is no impediment, and a bond muſt be entered into to theſe effects.

fatal to the marriage in England by act of parliament. In Ireland, though it makes the omiting parties, and particularly the perſon celebrating the marriage, ſubject to penalties, yet none of theſe requiſites are eſſential to the marriage, except, that it be performed by a perſon in orders, which rule itſelf is *poſitivi juris*, marriage not having been celebrated by the clergy in the earlier times; and, formerly, it was held, that a marriage by a layman, erroneouſly inſtituted to a cure, was good (35).

(35) But it muſt not be conceived, that the marriages of proteſtant ſectaries muſt be by a clergyman of the church of England; if their marriages are ſolemnized according to their own rites, and both parties are of the ſame perſuaſion, they are good to all civil effects; for inſtance, to ſupport an ejectment where legitimacy comes in queſtion, or an action for criminal converſation; but, if they come to entitle themſelves to any rights in the eccleſiaſtical courts, as to adminiſtration, they muſt prove a marriage according to the eccleſiaſtical law. 1 Salk. p. 119.; this is the caſe in England, and was ſo in Ireland before the 21 & 22 Geo. III. ch. 25, which enacts, that all marriages celebrated between proteſtant diſſenters by proteſtant diſſenting miniſters and teachers, ſhall be as valid, and the parties entitled to every right as much, as if ſolemnized by a clergyman of the church of Ireland; to this act one main objection was evident, that the meaning of proteſtant diſſenter not being ſufficiently, if at all, defined, members of the church of England might call themſelves proteſtant diſſenters for this particular purpoſe, and thus evade the neceſſity of banns or licence; *but for the able proteſt againſt this bill, ſigned by an uncommon number of peers, ſee the appendix.*

Omiſſion of any other of the circumſtances, above enumerated, merely ſubjects the clergyman offending to penalties preſcribed by the canons, viz. of deprivation, or degradation, without breaking the bonds of matrimony, in this kingdom.

Having now enumerated the various modes of marriage, and the impediments (36) to this contract, method would lead me to deſcribe its legal conſequences; but it may be uſeful, previouſly, to note ſome miſcellaneous ſubjects, not reducible to any of the preceding heads. Theſe relate to offences againſt the rights of marriage—to the penalties of illicit and clandeſtine marriages—to conditional reſtraints on marriage, and to marriage brocage bonds, or agreements.

Forcible marriages and abduction were, by the roman law, conſidered as equally criminal with rape, and each of theſe offences was puniſhed with death. With us, the law on this head depends on various ſtatutes (37).

(36) Among theſe impediments one has been omitted, not very generally noticed; the canons forbid clergymen to marry perſons who cannot ſay the creed, Lord's prayer, and ten commandments; might not the faſhionable world be ſometimes puzzled by a clergyman ſtrictly obeying this dictate.

(37) By 10 Car. I. Iriſh, taking or conveying away a maid or woman child, unmarried, within ſixteen, if done by any perſon above fifteen, puniſhed with two years impriſonment; taking away and deflowering, or marrying, ſuch per-

As to illicit marriages, the inſtitutes, after reciting the prohibitions of marriage, declare, that if any perſons preſume to cohabit in contempt of the rules above recited, they ſhall not be deemed huſband and wife; neither ſhall their marriage, or any portion given on account of ſuch marriage, be deemed valid. The code added alſo pecuniary mulcts, infamy, *et cum infamia pœnam ſtupri* (38), which was confiſcation of half the goods.

Our laws bear a ſtrong general analogy; they, in numerous caſes, make clandeſtine marriages, and thoſe illicit, (whether ſo from attention to the law of God, natural or revealed, or from reaſons of ſtate) void or voidable—and where they

ſon, five years impriſonment; the woman loſes any lands ſhe might have during her life.

By 6 Anne, ch. 16, ſeducing and marrying heireſſes under eighteen, puniſhed by three years impriſonment, and their eſtates veſted in truſtees. By the ſame act, if any maid or woman be carried away by force, and afterwards married or defiled, *with or without her conſent*, felony without benefit of clergy. The engliſh ſtatutes, on theſe ſubjects, are too well known to require to be inſerted here.

(38) *Stuprum eſt, quod virgini vel viduæ honeſte viventi ſine vi infertur*—this is its definition in the pandects; which Wood thus explains, *Stuprum*, ſays he, is when an unmarried man lies with an unmarried woman who lives in reputation, and is not ſuſpected to be a common proſtitute. Violence, however, did certainly, in ſome caſes, make an ingredient in the offence of *Stuprum*, ſo that it ſeems a word of various ſignifications. Its meaning has been frequently diſputed by the interpreters of college ſtatutes.

do not, they annex penalties to the parties, or to the prieſt celebrating the nuptials (39).

(39) I think it unneceſſary to inſert an account of theſe penalties, as exiſting in England; they being ſo generally known. The law of Ireland is now become intereſting to the engliſh lawyer, and is leſs promulged.

The penalties there, as to clandeſtine marriages, are principally to be found either in the canons, where they relate chiefly to the miniſter celebrating them without banns or licence, and ſubject him to deprivation if beneficed; degradation if not; or in the act 6th Anne, ch. 16, which, where the huſband's father has fifty pounds a year in lands, or five hundred pounds perſonal eſtate, and by ſubtle means the marriage is procured, or the party being under twenty-one, contracts matrimony without the requiſite conſents, diſables the wife from recovering dower, thirds, or jointure, ſubjects all acceſſaries to three years impriſonment, and makes the perſon celebrating the marriage, if a beneficed clergyman, liable to deprivation; if not, to tranſportation.

Our iriſh laws reſpecting marriages illicit, for reaſons of ſtate, relate principally to thoſe between papiſts and proteſtants, and their variations require ſome attention; it is no longer neceſſary to enumerate them all, but the principal were the following; by 9 W. III. ch. 28, marriage by a clergyman of a woman proteſtant, having freehold or leaſehold eſtates, or in perſonal property five hundred pounds, to any perſon without certificate of his being a proteſtant, ſubjected the clergyman to fine and impriſonment, but the marriage was not void.

By 12 Geo. I. popiſh prieſt or degraded clergyman, or layman, marrying two proteſtants, or a proteſtant to a papiſt, guilty of felony without benefit of clergy.

By 19 Geo. II. all marriages between proteſtants and papiſts, or between two proteſtants, celebrated by a popiſh

The civil law permitted the *proxenetæ*, or match makers, to receive a reward for their pains, C. 5. 1. 6 (40).

All reſtraints on marriage were held void by the civil law, and ſo they are by our eccleſiaſtical courts, the rule being there alſo, *maritagium debet eſſe liberum*, vid. 3 P. Wm. p. 239. Wroteſley *v.* Bendiſh (41).

prieſt, are *ipſo facto* void. Upon this clauſe diſputes have formerly ariſen, whether it avoided all marriages between proteſtant and papiſt, or only thoſe celebrated by a popiſh prieſt. If it did not invalidate all ſuch marriages, I know of no other law that did. It is now only a queſtion of curioſity, but the ſenſe of the legiſlature upon it is ſufficiently evident, by their thinking the act of 32 Geo. III. neceſſary.

But the law in theſe reſpects is almoſt entirely altered by the ſtatute 32 Geo. III. ch. 21, which repeals the above act of the 9th of William, and authoriſes the intermarriages of proteſtants and catholics, provided they be celebrated by a clergyman of the eſtabliſhed church; and by 33 Geo. III. ch. 21, a popiſh prieſt may marry proteſtants, or proteſtant and papiſt, if they have been previouſly married by a proteſtant clergyman, otherwiſe the marriage is void, and the prieſt ſubject to a penalty of five hundred pounds.

(40) Marriage brocage bonds, and agreements to reward perſons procuring a marriage, are entirely forbidden with us, and vacated by courts of equity.

(41) A condition in reſtraint of marriage prevails, *e.g.* a conditional legacy is forfeited if there be a deviſe over to another perſon, in failure of condition; but even ſo, our courts of equity have uniformly leaned againſt theſe re-

We muſt not conclude this chapter without obſerving, that beſides the honours and rewards annexed to marriage at Rome, ſuch as the *jus trium liberorum*, which conveyed various privileges and exemptions, the laws actually compelled marriage by puniſhing celibacy with fine, and it was a branch of the cenſor's office to put it in execution; on the ſame principle, a parent could not diſinherit a daughter for incontinence, for whom he did not provide a huſband before twenty-five; even the childleſs loſt one-half of a legacy bequeathed, the other eſcheating to the exchequer. But, in later times, the privileges attending the parent of three children were, by a benign fiction, extended to others.

It muſt alſo be noted, that the man who had not a wife might lawfully have a concubine, but not both together. The popes of old authoriſed concubines; and it appears by our legatine conſtitutions they were uſual with the clergy.

A concubine does not mean in the civil law a harlot; the concubine was a perſon taken to co-

ſtraints, and anxiouſly endeavoured to conſtrue them as meant only *in terrorem*, or to find out ſome virtual compliance; and if the condition be conſent, that conſent, if denied without reaſon, is not regarded. Deviſes over are, however, ſometimes conſidered in the light of a forfeiture, nor has the party, when it is a forfeiture, any cauſe to complain, if already well provided for by the ſame will; and, therefore, if it be in ſuch a caſe a condition precedent to a marriage, it cannot be got over.

habit in the manner, and under the character, of a wife, but without being authoriſed thereto by a legal marriage. Concubinage was confined to a ſingle perſon—was of perpetual obligation as much as marriage itſelf—was a ſociety recognized by the laws, and, in general, entered into between perſons who, by laws of policy, were forbidden by the ſtate to marry together for want of quality or fortune—the concubine might even be accuſed of adultery. Theſe characters ſhew how widely miſtaken we ſhould be, if we annexed the idea of immodeſty and contempt to the name of concubine among the ancients, as we do in modern times.

CHAPTER II.

HUSBAND AND WIFE CONTINUED.

HAVING treated in the laſt chapter of the method by which marriages were formed among the Romans, I proceed to conſider their legal conſequences, and afterwards the ways in which this connection might be diſſolved.

As to their legal conſequences, we ſhall find many inſtances of diverſity between the roman law and ours. One grand diſtinctive principle between the two laws on this ſubject is, that by theirs, huſband and wife were conſidered as diſtinct perſons, who might have ſeparate eſtates, contracts, debts, and injuries, whereas ours treats them only as one; ſuch is their ſuppoſed union. On this principle reſts great part of the variations on this head, between the two codes.

Hence, in the firſt place, they might grant to and contract with each other, upon valuable conſideration, a privilege unknown among us; but gifts between them, without conſideration, were invalid, leſt affection ſhould be made the dupe of art, and exceſſive fondneſs the inſtrument of

ruinous donation (1). On the ſame principle they might ſue each other, as they are allowed to do in thoſe of our courts which have chiefly retained in view the imperial conſtitutions, viz. the courts of equity (2) and eccleſiaſtical. This liberty, however, was ſo far reſtrained at Rome, that the huſband could not have an action againſt the wife, implying infamy or turpitude. If a divorce indeed took place, ſhe might be convened for goods previouſly by her taken, in an action *rerum amotarum*, and if ſhe ſtole his goods after a divorce, ſhe was liable to an action of theft (3).

From this power of contracting in the wife, the miſchiefs which might be apprehended were obviated by rendering her contracts inoperative upon the huſband, as fully as his were upon her; as they were ſeparate perſons, they were unconnected in their agreements with others, and the wife might ſue and be ſued without her huſband,

(1) Gifts between huſband and wife among us, are often ſupported in equity, though the law does not allow the property to paſs, Fonblanque, vol. 1. p. 94. He may give by the intervention of truſtees and by will. 1 Blackſtone.

(2) Vid. among many others, Brooks and Brooks, Pre. Ch. 24. Moore *v.* lady Moore. 1 Atk. 272. Oxenden and Oxenden, 293.

(3) The phraſe of convening, and the expreſſion an *action of theft*, ſo novel to the ſtudent of common law, will be explained in the ſequel.

as ſhe may now in our eccleſiaſtical courts (4). The fourth book of the code expreſsly declares, that the huſband ſhall not be bound by the wife's debts or contracts, and gives the reaſon, *nam neminem alterius contractu obligari, certiſſimum eſt.* The huſband was indeed obliged to maintain the wife, even though he married her without a wedding portion; but this obligation, if violated, only gave her a right to ſue him for alimony, but did not make him liable to her debts (4).

As the huſband was not anſwerable for the wife's debts, ſo neither was he for the injuries by her committed, nor is he with us, for the union in the Engliſh law is merely a civil union, they do not make one perſon when conſidered in a criminal light; with this exception, that with reſpect to ſome inferior offences ſhe is ſcreened by him, on the ſuppoſition of being under conſtraint; and as here huſband and wife join in actions for injuries done to her, ſo at Rome he was to defend her from injuries, and might proſecute the author of her wrongs.

It might be ſuppoſed that huſband and wife being thus ſeparate perſons, might be witneſſes

(4) With reſpect to the effects of his debts upon her eſtates, or his power over her eſtates, that part of the ſubject will be found in its proper place, under the head of Title by Marriage, in the ſecond book, which treats of Rights to Things.

for or againſt each other. They could not (5); which ſeems to confirm the opinion of Dr. Chriſtian, in oppoſition to Judge Blackſtone, that ſuppoſed union of perſon is not the principal ground of this prohibition, but the want of indifference naturally to be expected. The Roman law ſo far apprehended the partiality of affection, and reſpected the peace of families, as to refuſe the reciprocal evidence of father and ſon, and brother and ſiſter; and in France, Domat informs us, that the depoſitions of kindred were rejected, as far as the children of couſin germans.

It remains only to conſider, among the perſonal effects of marriage, the power of the huſband over the wife's perſon; in this reſpect the civil law did not materially differ from ours, at leaſt in later times (6), both allowed the huſband (however harſh ſuch powers may now appear, and however juſtly forgotten in polite life and refined ſociety) to correct the wife with moderation; the civil law indeed was leſs attentive to this moderation than ours, ſince it allowed, in ſome caſes, *flagellis & fuſtibus acriter uxorem verberare;* but ſtill there was a limit, and a certain degree of cruelty enabled her to

(5) See Wood, 315.

(6) For in earlier it gave the huſband a power of life and death over the wife, for grievous crimes, as well as over the children, Dion. Halyc. Plin. Nat. Hiſt. 14 B.

obtain a ſeparate maintenance, or even a divorce; there are ſome veſtiges of old ſeverity under the emperors, vid. Suetonius, Tiberii vita. Tac. Ann. 2. 13. 32. It muſt be obſerved, that if the wife had not been emancipated by her father, ſhe remained in the father's power, not in the huſband's, though not ſo far as to give her a full power over her property by her father's conſent only, without that of the huſband; ſhe took the huſband's name as daughters did their father's, whence in inſcriptions, *Antonia Druſi.*

DIVORCE.

I come now to conſider how marriage may be diſſolved, and this is either by death or divorce (7).

(7) Whoever compares the text above with the following note, will ſee how much better this matter has been regulated among modern chriſtian nations, and how differently from that looſe union amongſt the Romans, which might be diſſolved ſo eaſily, and upon ſuch trifling occaſions; in the firſt place, even when among us there is reaſon for a ſeparation, it does not follow that there ſhould be a total ſeparation, a partial may anſwer the purpoſe, which we call *a menſa et thoro*, from bed and board. This does not give the parties liberty to marry, nor does it baſtardiſe the children begotten before the divorce, and the parties may live together again if they pleaſe.

A divorce *a vinculo matrimonii*, has all theſe effects, if made on account of canonical impediments by the ſpiritual court.

Plutarch, in his life of Romulus, tells us, that he permitted an option of divorce to men,

The cauſes of divorce, a *menſa & thora*, are very various, ſuch as cruelty, intolerable ill temper, and ſo forth. But the cauſes for which the ſpiritual court can diſſolve the marriage a *vinculo*, muſt be ſuch as are either grounded upon the expreſs words of the divine law, or plainly derive their origin from that ſource, ſuch as conſanguinity, affinity, and certain corporeal infirmities—for theſe cauſes the marriage is voidable, not void without ſentence; and to avoid it, there muſt be a ſentence of nullity, declaring it to have been void. This can only be obtained during the life of the parties, becauſe it is *pro ſalute animarum*. Even adultery, though the only cauſe of divorce aſſigned in the New Teſtament, is not in the ſpiritual courts a cauſe of divorce *a vinculo*, but only a *menſa & thoro*. To obtain a divorce *a vinculo* then, an act of parliament muſt be had, and this is uſually granted only in caſes of adultery on the part of the woman; but of late years, ſome ſhameful cauſes having been brought to light, where it appeared that the parties wiſhed to be parted *a vinculo*, in order to marry again, and therefore had by conſent laid a ſcheme that the woman ſhould be detected with the adulterer, and perhaps only with a ſham paramour, parliament has leaned a little againſt ſuch acts, and refuſed them in ſeveral caſes where circumſtances were ſuſpicious; and lord Thurlow has been particularly active in ſetting his face againſt ſuch contrivances.

The ſame thing would happen as to divorces in the ſpiritual courts, if the ſole confeſſion of the parties were to be admitted, even though upon oath; of this we have an inſtance in Mod. Rep. 2. p. 315. The huſband and wife agreed that a libel ſhould be given in againſt

but not to women; there muſt however be a cauſe, as adultery, attempt to poiſon, &c. per-

him, that he had before married her ſiſter, and they procured the ſiſter to come in and confeſs this. This prohibition againſt receiving the ſole confeſſion of parties, is found in the canon law, and is expreſsly inſerted in the canons of our church; for in old times, ſeparations were made among us on this confeſſion, and were then very numerous and frequent.

If the marriage be originally void, there ſeems to be no occaſion for a ſentence of ſeparation; and in that caſe the wife is barred of dower, the iſſue is illegitimate, and the perſons may marry again: thus, for example, in the caſe of bigamy, Cro. Eliz. 857. Debt upon an obligation; defendant pleaded, that at the time of making the bond, ſhe was wife to a perſon therein named. The plaintiff ſhewed, that that perſon had a wife alive at the time he married defendant, and there had been a declaratory ſentence in the ſpiritual court. Judgment for the plaintiff, and ſaid there was no occaſion for ſuch declaratory ſentence.

If the marriage be voidable for canonical impediments, then after ſentence the effects are the ſame as if it was void *ab initio*.

Effects of divorce a menſa & thoro.

This does not bar the wife of dower, nor baſtardiſe the children, nor prevent the huſband from enjoying her property, or whatever may come to her; but he muſt allow her alimony; where indeed the divorce is for her own crimes, the court, at their direction, refuſe her alimony; and if ſhe elope, and live with the adulterer, ſhe loſes dower. In the year 1554, Burnet mentions a petition of the clergy in convocation to the upper houſe, that in divorces which are made from bed and board, proviſions may be made that the innocent woman may enjoy

haps drunkenneſs; for we find from Dion. Hal. &c. that the huſband could ſeverely puniſh this

ſuch lands and goods as were her's before the marriage, or that happened to come to her uſe at any time during the marriage; and that it may not be lawful for the huſband, being for his offence divorced from the ſaid woman, to intermeddle himſelf with the ſaid lands or goods, unleſs the wife be to him reconciled. But we do not find any conſequence of this petition.

The children born after a divorce, *a menſa et thoro*, during ſuch ſeparation, are baſtards, 1 Salk. 123. for a due obedience to the ſentence ſhall be intended, unleſs the contrary be ſhowed. But if *baron and feme*, without ſentence, part and live ſeparate, the children ſhall be taken to be legitimate, and ſo deemed till the contrary be proved, for acceſs ſhall be intended until the contrary is ſhewn.

The canons direct, that in all ſentences of divorce, *a menſa et thoro*, there ſhall be a caution and reſtraint inſerted in the body of ſaid ſentence, that the parties ſo ſeparated ſhall live continently, and that they ſhall not, during each others lives, contract matrimony with other perſons, and no ſentence is to be pronounced till the parties give ſecurity to obey this reſtraint. At a time when a reformation of the laws was intended, this ſort of divorce was deſigned to have been taken away, and the book called *Reformatio Legum*, which is a ſketch of ſome part of what was propoſed, condemns this ſpecies of divorce very ſeverely, as *conſtitutio a ſacris literis aliena*. Reform Leg. 28, 6.

Even though the huſband has been divorced *a menſa et thoro*, on account of the incontinency of the wife, yet he cannot marry again during her life. Mo. 683. yet by the law of Heaven he might—Whoſoever ſhall put away his

offence, after having laid the caſe before her relations. The twelve tables allowed divorce, but not without good cauſe. Yet, notwithſtanding this permiſſion, there was no inſtance of divorce at Rome, till the year U. C. about 500, when Spurius Carvilius Ruga parted with his wife for ſterility; but afterwards they became beyond meaſure frequent. Wives were diſmiſſed, not only for want of chaſtity, or for intolerable temper, but for the ſlighteſt cauſes.

Paulus Æmilius diſmiſſed his wife, aſſigning this general vague cauſe, that ſhe injured him. Sulpicius Gallus, becauſe his wife went abroad bareheaded. Sempronius Sophus, becauſe ſhe had gone to a public ſpectacle without his knowledge; and even Cicero Publilia, becauſe ſhe ſeemed to rejoice at Tullia's death. The famous inſtance of Cæſar ſending away Pompeia, becauſe Cæſar's wife ſhould not even be ſuſpected, is in every one's mouth.

wife, *except it be for fornication*, and marry another, committeth adultery. Matt. xix. 9. and the *reformatio legum* would have allowed another marriage, when the divorce was for ſuch cauſe, unleſs both parties were guilty, and this is the doctrine of the canon law. Extra. lib. 4. tit. 19. c. 5. t. 16. Upon this principle, ſome acts of parliament for the divorce of parties on account of adultery, have expreſsly allowed the innocent perſons to marry again. Acts of parliament have never been made to divorce *a vinculo*, except for adultery.

Recrimination, ſupported by proof, is a bar to divorce in the ſpiritual courts for adultery.

In later times, wives had a licence of divorce at their pleaſure, and practiſed it abundantly, on ſlight or no cauſes.

In Cicero's Epiſtles, Cœlius writes to Cicero, *Paulla Valleria ſoror Triarii, divortium ſine cauſa, quo die vir e provincia venturus fuerat fecit. Nuptura eſt D. Bruto.*

Divorces were made with certain ſolemnities, and theſe ſolemnities correſponded to the reſpective modes of marriage; if the parties had been united by confarreation, they were ſeparated by diffarreation. It is not clear what were the ceremonies received upon this occaſion, except that we know that this, as well as confarreation, was a ſpecies of ſacrifice, and that a corn cake was made uſe of in both. Plutarch mentions this mode of divorce, and from him we learn, that it was attended with ſome horrid and ill omened rites.

He ſpeaks of the divorce of a *flamen dialis*, who was always, *I believe*, married by confarreation. Thoſe who were married by coemption, were divorced by remancipation; as the form of marriage was to buy, ſo the form of divorce was to ſet free, or to make over to another. By this form of divorce, Cato of Utica eſpouſed his wife Marcia to Hortenſius, a remarkable fact mentioned by Plutarch; as the fiction was that he bought her, he might ſell her to another by fiction. Thus we find from Dio. that Tib. Nero gave his wife Livia, even while pregnant, to

Auguſtus; in the ſame manner that a father was uſed to give his daughter. If a wife was obtained by uſe, ſhe had it in her power to divorce herſelf, by being abſent from her huſband three nights before the end of the year. The very abſence conſtituted a divorce. In later times, the ceremonies of divorce were few and very ſimple. Breaking the *tabulæ dotales*, as appears from Tacitus, Ann. 11. 30. depriving her of the keys, which were always delivered to her among the forms of marriage, and ſending her a meſſage in a certain form of words, both verbally and in writing, intimating the intention to ſeparate, was ſufficient.

Auguſtus, who wiſhed to put ſome checks in the way of divorces, directed that there muſt be ſeven witneſſes to the divorce, all roman citizens, and adult, otherwiſe it was invalid. After the empire became chriſtian, it might be ſuppoſed that divorce could not have been ſo eaſy; yet the contrary ſeems to have been the caſe.—See Erſkine's Inſtitutes, p. 73; and Novel. 140. p. 1.

The effects of divorce were, of courſe, with reſpect to the perſon, liberty to marry again, and a total freedom from the former huſband's power. I do not find that the Romans were acquainted with that partial ſpecies of divorce, called with us a *menſa et thoro*. But if ſhe was divorced on account of her own miſbehaviour, or bad morals, the huſband gained all her dowry. Hence it became a practice to marry women of known bad conduct, in order to have an opportunity of pro-

ving it, and thereby gaining the dowry. An example of ſuch a man, viz. C. Titinnius, of Minturnæ, is mentioned by Plutarch, in his Life of Marius. If the divorce was for his own fault, ſhe or her father got back her dowry. *Dowry*, in the civil law, always *meant* the portion brought *by* the wife; a very different ſignification from dower with us.

Hitherto we have ſpoken of divorces at the will of one party; but if both conſented, there ſeems to have been no difficulty; and in that caſe the wife not only took back her dowry, but alſo carried away all the gifts and preſents made by the huſband.

Divorce is only between perſons actually married. But there was alſo a mode of ſeparating perſons only eſpouſed, and this was called, not *divortium*, but *repudium*. Here there was no occaſion for any particular cauſe; whim was ſufficient; no action lay for this change of will; and the only form was, ſending this meſſage, *Tua conditione non utor*.

A compariſon of this law with ours has been carried on in the notes, and completes our obſervations on the ſubject of marriage, the law of which, however, is ſo extenſive, that ſome things muſt neceſſarily have been omitted; and, among other topics, I may be blamed, perhaps, for not here touching on two not unimportant: the effects of ſtatute laws on contracts of marriage abroad, and the effects of a ſentence in the eccle-

ſiaſtical courts; but it muſt be recollected, that theſe belong to other and more general heads (8). I ſhall, therefore, only here obſerve, that great doubts have ariſen how far an act of parliament affecting marriage can be evaded by going abroad, or affected by the *lex loci.*

This was particularly agitated with reſpect to ſcotch marriages. Mr. Hargrave, as has been already obſerved, ſays the point *ſeems* fully ſettled in favour of ſcotch marriages by a late deciſion of the court of arches, afterwards confirmed by the delegates.

Whether this deciſion went upon the marriage act being conſtrued to be confined to England, we are not informed; but certainly there would be a material difference between an act purporting to affect his majeſty's ſubjects in all quarters of the globe, and an act confined to the country in which it was made.

I can with difficulty reconcile myſelf to the idea of a man leaving England to go to Scotland, or Ireland to go to the Iſle of Man, to evade and defy a law made purpoſely to affect him; and it is obſervable, that Mr. Hargrave goes on to ſay—"However, it may not be amiſs to recollect that "there have been perſons of authority, particularly Huberus, a much-eſteemed writer, who will "not allow ſuch caſes of apparent evaſion of the "law of any country."

(8) The firſt to general principles regulating foreign contracts, the other to the head of courts eccleſiaſtical.

The whole matter then ſtands thus:

By the general rule the lex loci prevails.

Huberus excepts theſe caſes of evaſion.

Lord Mansfield doubted whether ſcotch marriages were not within this exception.

The caſe of Compton *v.* Bearcroft ſays they are not.

The caſe of Ilderton *v.* Ilderton, ſays, that a marriage in Scotland between perſons *who do not* go there for the purpoſe of evading the laws of England, will entitle the woman to dower in England (9).

If the deciſion in Compton *v.* Bearcroft be the law, it remains to be known, whether it went on the *wording* of the marriage act, or on a general principle.

On all theſe circumſtances the juriſt muſt form his opinion on the queſtion, which I will ſtate here in the words of Mr. Hargrave: "Whether the "lex loci ought to be applied to caſes accom- "panied with circumſtances ſo ſtrongly marking "an intent to evade the law of the country, to "which the parties belong?"

But I muſt ſtill diſtinguiſh an act ſuch as that in Ireland of 9 Geo. II. ch. 11. attaching on the fact of marriage generally wherever it happen, and an act like the marriage act of England, confined in its words to that country (10).

(9) 2 Hen. Blackſtone, 145.

(10) Sir James Marriott has ſpoken of Huberus, ſo reſpectfully mentioned by lord Mansfield and Mr. Hargrave,

A ſentence of the eccleſiaſtical court, obtained in a ſuit in its nature definitive, and obtained without fraud or colluſion, is concluſive evidence in any other court (11).

in his judgment on the ſhip Columbia, with the utmoſt contempt, as an ignorant dutch ſchoolmaſter; and being of opinion that every marriage is a gain to the ſtate and to true religion, commends that expoſition which ſays, "If you "ſtay at home, you ſhall conform to the ancient laws; but, "if you will take the trouble to ſkip over the next ditch "into another territory to be married, we will hold the "marriage valid at your return." This is at leaſt a merry mode of conſidering the ſubject.

(11) A common idea to the contrary has gone forth among men not of the legal profeſſion, from the ducheſs of Kingſton's caſe. But the ſentence ſhe offered in bar, was in a ſuit for jactitation, which ſuit is not definitive, and never paſſes in *rem judicatam*; it only ſhews that, for the preſent, the boaſter has not proof, and enjoins him to ſilence, but with liberty to bring new proof whenever he can; and beſides, the ſentence appeared to have been obtained by colluſion. But the lords never determined that a fair ſentence in an eccleſiaſtical court on the ſame identical point, coming directly before it between the ſame parties, in a ſuit in its own nature definitive, was not concluſive, *e. g.* plea of coverture by a woman in a perſonal action, ſentence of nullity is concluſive evidence againſt her.

CHAPTER III.

MASTER AND SERVANT.

IN treating of the rights of perſons, the firſt relation which the Roman law offers to our view, is that of maſter and ſervant, or rather of maſter and ſlave; for, at Rome, ſervitude was in theory, and generally in practice the extreme of ſlavery. It is a melancholy conſideration, that on the very threſhold of this magnificent pile of juriſprudence, erected by a nation whoſe mighty boaſt was freedom, ſlavery ſhould preſent itſelf in its moſt hideous form. Nor is it unworthy of reflection, that nations moſt attached to liberty, ſeem to conſider it as a treaſure confined to themſelves, an ineſtimable bleſſing which they avariciouſly embezzle, and refuſe its extenſion beyond their ſelfiſh limits.

Liberty and tyranny have kept pace with each other. The helots of Sparta, the ſlaves at Rome, the villeins of the feudal ſyſtem, bear teſtimony to this melancholy truth. Sorry we muſt be to add to the number our native countries, which have fixed the model of rational liberty among nations; whoſe ſingular glory is the enjoyment of freedom, and which have, notwithſtanding, in the colonies,

eſtabliſhed a ſyſtem of cruel ſlavery, perhaps beyond example in any other age or realm.

That no ſyſtem of ſlavery can find a foundation in juſtice and reaſon, has been often demonſtrated by the ableſt writers. Its pretended juſtifications, ſet up by Juſtinian, of captivity, contract, and birth, will not ſtand the teſt of common ſenſe. The rights of conqueſt have no ſuch extent (1). Self-impoſition of voluntary ſlavery is forbidden to man by the law of nature; and hereditary ſlavery cannot exiſt when the grounds of original ſervitude are taken away. But little will arguments of reaſon prevail with avarice and injuſtice: on men poſſeſſed of ſuch paſſions, ſmall will be the effect of painting the horrid cruelties which reſult from veſting unbounded power in weak, impotent, frail mortals. If a direct appeal to feeling does not ſucceed, argument and eloquence are uſeleſs on the ſubject, for they muſt be addreſſed to brutes.

Since, however, ſlavery has pretended to a ratification from law, I muſt proceed to my duty of unfolding the condition of ſlaves at Rome (for as to that of menial ſervants, or apprentices, antiquity has handed down to us ſo little on the ſubject, and ſlaves, as in our Weſt Indies, ſeem ſo entirely to have ſupplied the deficiency of free ſervants, that it is not worth our pains to treat of them), nor will a compariſon of the ſituation of the Roman ſlave, with that of the ancient villein and modern negro, be foreign to the ſubject.

(1) Vid. Locke on Government.

The Romans divided persons, in their most general discrimination of them, into freemen and slaves. Freemen, again, into such as were in their own power, *sui juris*, and such as were not; and, by another distinction, into such as had always been free, called *ingenui* (2), and such as had been made so, called, at various periods, sometimes *liberti*, and sometimes *libertini* (3).

Of slaves themselves the Romans did not reckon different orders, their reason for which requires some explanation, and will tend to throw light on some other parts of their law.

They considered persons, and they defined the meaning of the word to be, not only human creatures, but men considered in relation to some state, either natural, a state of nature, or civil; if civil, that state to which he was referred, was either of liberty, citizenship, or family (4). Now,

(2) An unjust or illegal servitude did not prevent a man from being *ingenuus*.

(3) In the earlier ages of the Republic, libertinus meant the son of a freed man; but afterwards, equally with libertus, it meant the freed man himself. When Horace says, *Libertino patre natum*, he means that his father, not his grandfather, was the freed man.

(4) Losing any one of these states or conditions was called *capitis diminutio*, and was either *maxima*, when all these three rights were lost—middle when only citizenship—least, when only those of the master of a family. The explanation of these terms is often requisite to the understanding of Latin authors.

as a ſlave was a ſtranger to liberty, could not be a citizen, and had not the rights of a maſter of a family, he was not allowed to be a perſon, but conſidered as a *thing;* and, conſequently, the diſtinctions of perſons into orders was not conſidered as having relation to him.

This quaint and pſeudo philoſophical idea, (for the Roman lawyers were extremely fond of borrowing from the ſects, particularly from the ſtoics) did not exclude many real diſtinctions of ſlaves into temporary and perpetual, conditional and abſolute, thoſe who were attached to the ſoil, *adſcriptitii glebæ,* (reſembling a certain claſs in the French Weſt India colonies) and thoſe which were not.

I ſhall now conſider how ſlavery was created; ſecondly, its effects; thirdly, how diſſolved; and, in the notes, compare their law upon theſe heads, with the ancient Engliſh and modern Weſt Indian codes.

SLAVERY, HOW CREATED.

Firſt, by captivity.—Hence they ſaid *ſervi* were *quaſi ſervati, & mancipia quaſi manucapti;* fanciful etymologies of the ſtoics, which they ſubſtituted for definitions. This pretended foundation of ſlavery, has been ſo ſucceſsfully exploded by Locke, Blackſtone, and many other writers, that it requires no new argument to expoſe its futility. Accordingly, among modern civilized nations,

captivity in war has produced no ſuch effects, nor even in the wars of Mahometan princes among themſelves. The Engliſh coloniſt in the Weſt Indies, indeed, has not bluſhed, at ſupporting this aſſumed juſtification of ſlavery, in concord with the African barbarian from whom he purchaſes.

Secondly, By birth,—ſlaves were things, as we have obſerved, and, therefore, the child of the female ſlave was conſidered as belonging by acceſſion to the maſter; and the rule was, with reſpect to ſlaves, *partus ſequitur ventrem* (5), a maxim which prevails in all our Weſt India colonies; whereas, among free perſons, their law, as well as that of England, ordains that the child ſhould follow the condition of his father, and, indeed, the law of England made the rule univerſal; therefore, in ancient times, if a bond woman or neiſe had married a free man, the iſſue was free; and at Rome, in favour of liberty, if the mother at the time of her conception, or delivery, or in the intermediate time between them, had been free even for a moment, the child was free.

Thirdly, by ſale—from others or themſelves, for perſons of above twenty years of age might ſell *themſelves* to ſlavery, which no man can do by our laws; *i. e.* he cannot reduce himſelf to abſolute ſlavery (5), though he may bind himſelf in certain

(5) By abſolute ſlavery, I mean ſubjection to unlimited power over life and fortune. Captivity, birth, and ſale, the uſual origin of ſlaves in the Weſt Indies.

articles of ſervitude for years, or for life, as do the indented ſervants, uſually ſo called, who frequently thus get themſelves conveyed to our plantations: the Jewiſh law permitted this practice.

Fourthly, By crimes,—but this, for the moſt part, was only for capital crimes. An exchange of puniſhment which of late years our laws have adopted in ſome meaſure by condemning criminals, though not to gallies, yet to working in the hulks, and near them. A meaſure, I own, repugnant to my judgment, and though it has been in our times admitted, yet, in former periods, ſo odious to the feelings and opinions of the Engliſh, that an attempt to introduce it in the reign of Edward VI. was ſo univerſally condemned and reprobated, as to be inſtantly quaſhed; however the reſemblance of the ſtate of theſe culprits to that of the Roman *ſervi pœnæ* is but remote, the latter loſing the rights of marriage, of making wills, and almoſt all other privileges of man.

Fifthly, A few crimes or offences, leſs than capital, by which perſons were reduced to ſlavery, as they were mere creatures of Roman poſitive and temporary laws, need barely be mentioned; theſe were frauds, to avoid the cenſus, or muſter roll, in order to eſcape the war levies or requiſitions—not appearing at the end of a year, after having entered into recognizance in ſome court to appear—criminal intercourſe between a free woman and ſlave, which reduced her to his condition—tried

and decided ingratitude by ſome proper tribunal in a freedman towards (6) his patron, which reduced him to his former ſtate.

2. EFFECTS OF SLAVERY AT ROME.

Servants at Rome were things, therefore, the maſter had the ſame power over them as over things; could ſell them, or give them away by donation or legacy; could put them to death, or puniſh them at pleaſure; and whatever they acquired, they acquired not for themſelves, but their maſters. This immenſe power degenerated into barbariſm, until, in later and more civilized times, laws were made to reſtrain unbounded ma-

(6) In England ſlavery exiſted among the Saxons, introduced, perhaps, by Daniſh tyranny, though the origin of it, or upon what foundation put, (probably, I think, conqueſt,) does not ſeem to be aſcertained, and was reduced on the Norman conqueſt to the ſtate called villenage; in our Weſt Indies, the pretended foundation of ſlavery muſt generally be captivity, birth, or purchaſe from African venders of captives, criminals, debtors, or hereditary ſlaves. That ſlavery cannot be created in England, or even exiſt, is univerſally known, ſince the determination in the caſe of Somerſet the negro, in 1772; and the neceſſity of baptiſm to freedom, coupled with the notion that heathens could legally be enſlaved, has long ſince been exploded. Kinds of ſlaves were, ordinary, or adſcripti glebæ; ſo, villeins regardant, or in groſs—ſlaves in the French Weſt Indies, attached to the ſoil or not; but alas! no ſuch diſtinction, I apprehend, in our colonies.

giſterial tyranny. Auguſtus began by directing the prefect of the city, to take care that no immoderate cruelty ſhould be exerciſed upon ſlaves. In the reign of Claudius, a law was enacted, making the crime of killing a ſlave, homicide; a law apparently inefficacious, ſince, at a ſubſequent period, Juvenal Sat. v. l. 219, introduces a lady ordering her ſlave to be crucified: a remonſtrance is made to her, that he is innocent; ſhe makes the celebrated anſwer,

Nil fecerit, eſto,
Sic volo! ſic jubeo! ſtet pro ratione voluntas.

The Roman, indeed, ſeems to have been ingenious in inventing torments for his ſlave. *Stimuli, laminæ, cruces, compedes, nervi, catenæ, carceres, tortores, ſuſpenſa a pede centipondia,* are terms perpetually occurring in Latin authors (7).

(7) Let us now compare his condition with that of the Norman villein and Colonial negro. If among the Saxons, a ſlave's eye or teeth were beaten out by the maſter, the ſlave recovered his liberty; if he was killed, the maſter only paid a fine to the king. The villeins of the Norman æra were in a better ſituation, the lord was not allowed to maim, much leſs to kill them; it is true, that whatever the villein acquired belonged to his maſter, *e. g.* if he purchaſed land, and that he could not proſecute an action againſt his lord; but he might bring ſuit againſt all other perſons, and even againſt his maſter; might have an appeal for his anceſtor's death, and the chaſtity of the neiſe was protected from outrage, by giving her an appeal of rape.

Adrian repreſſed this torrent of horror, by ſomething more than words; he baniſhed ſeveral

It is matter of real lamentation, that the compariſon of theſe conditions, with that of the ſlave in the Weſt Indies, is plainly favourable to the former.

It is ſaid, however, that the accounts of colonial cruelty have been much exaggerated, and much pains have been taken to combat the general conviction by aſſertion, and by evidence. To avoid ſuch imputations, let us recur then to undiſputed facts, acknowledged by clear, ſenſible, and well informed writers, acquainted with thoſe regions, and long reſident there. It does not ſeem to be diſputed by them, that until within theſe few years, the power over life and limb, was either expreſsly given to the maſter, as well as that of whipping and beating without limit; or, at leaſt, ſuch exerciſes of authority were either overlooked, or ſlightly puniſhed. In Barbadoes, the wanton and wilful murder of a negro is ſaid to have received its compenſation, by the payment of fifteen pounds ſterling, into the public treaſury: and in Jamaica, until the year 1792, a white man, whether proprietor or not, who had killed a negro, or by an act of ſeverity been the cauſe of his death, was for the firſt offence entitled to benefit of clergy, and not liable to capital puniſhment unleſs he repeated his crime.

That dreadful and unmerciful ſcourgings were inflicted will not be denied, and all that Mr. Edwards, the ableſt advocate for the colonies, has ſaid is, that they have not been frequent. 'The narratives,' ſays he, 'of exceſſive whippings, and barbarous mutilations, ſhall not be aſſerted by me, as they have been by others, to be all of them abſolutely falſe. Though they have happened but ſeldom,' he adds, 'they have happened too often.' That the power does exiſt has been acknowledged, and let me aſk the heart of man, when not ſwollen by inordinate vanity, whether ſuch power

perſons, who, upon ſlight cauſes, had treated their ſlaves with cruelty. Antoninus Pius extended

can exiſt without abuſe—let the mildeſt native in theſe climes recollect the temporary paſſion produced by the offences of menial ſervants, attended, perhaps, with circumſtances of real and conſiderable provocation, and aſk whether, at the inſtant, his reaſon could always be confided in as the guardian of his anger. The heart of man is deceitful above all things, and impoſes upon its owner. I do not charge the Weſt India planter with being naturally bad, nor deny his being in many caſes a good and beneficent maſter. Even thoſe who are otherwiſe may, perhaps, often be the victims of habit and uſage, overcoming a good diſpoſition. Caligula, had he been a ſubject under a well regulated government, might poſſibly have exhibited a tolerable character. I mean only, that unlimited power is ſuited to none but the Allwiſe and all Good Creator of the Univerſe, and generally in the breaſts of frail mortals exterminates humanity; he who ſuppoſes himſelf able to wield ſuch a ſceptre, while he thinks he ſtandeth, ſhould take heed, leſt he fall.

But departing from arguments founded in the nature of things and man, let us conſider the facts implied by the famous conſolidated act paſſed in Jamaica in 1792, the boaſt of colonial philanthropy. That act prohibits arbitrary and unlimited puniſhments—makes the murder of a negro a capital crime in the firſt inſtance; forbids the loading them with iron chains, collars, or weights, except when neceſſary for ſecuring the perſon of the ſlave; puniſhes with fine and impriſonment his mutilation, and, in certain caſes, imparts freedom to the injured, allows them certain holidays, gives them one day in a fortnight, excluſive of Sundays, to cultivate their own proviſion grounds, with many other humane proviſions, ſome of which I am ready to admit, had been before received by law or cuſtom, yet the general view

the penalties of the Cornelian law made againſt aſſaſſins, to thoſe who ſhould kill their ſlaves with-

of that act will prove to the inveſtigator the cruelty of antecedent practice, by the neceſſity of its novel regulations; and notwithſtanding its ſalutary effects, the following hardſhips, which ſtill exiſt, ſufficiently ſhew the miſerable ſtate of the ſubjected African.

Firſt, It is acknowledged and lamented by Mr. Edwards, that the evidence of a ſlave cannot be admitted againſt a white perſon, even in caſes of the moſt atrocious injury. What then import laws made to puniſh tyranny, if the tyrant, by removal of all white witneſſes, may with impunity exerciſe his cruelties upon, and in preſence of the blacks.

Secondly, In our colonies they are not attached to the ſoil; in the French they were: hence the reſentment of the maſter can tear the wretch who offends him from the embrace of his wife and family, and ſell him again to be tranſported by ſome new maſter, perhaps to the mines of Mexico; and the ſame conſequence may follow from the imprudence of a ſpendthrift owner, whoſe ſlaves are dragged to public auction by a ſheriff's officer. This practice, ſanctioned by a Britiſh ſtatute, is alſo marked and reprobated by Mr. Edwards himſelf.

Thirdly, The conſolidated act is peculiar to the iſland of Jamaica, where, as well as in Grenada, the condition of ſlaves was always more tolerable than in the other iſlands; but to give energy and effect to that act, ſome public officer is wanting, OBLIGED to defend the rights of the negroes. Councils of protection have, indeed, been appointed, but they never can afford ſuch prompt aſſiſtance as an individual attorney, who has no other employment. In this reſpect, therefore, the French colonies have the advantage. Their ſlaves are attached to the ſoil; their *Code Noir* is much more forcible than a colonial act, ſuch as the conſolidated law of

out juſt cauſe, which juſt cauſe ſeems to have been, finding him in a plot againſt his maſter's life, or in adultery with his conſort; and a law in the code gave the ſlave a remedy, if he was intolerably puniſhed by his maſter; ſo, that in the later periods of the Roman Empire, his condition was ameliorated in a very conſiderable degree.

OF DISSOLVING SLAVERY, OR MANUMISSION.

Cenſus, Teſtamentum, Vindicta, were the ancient methods, and the ſolemn ones. The firſt was by enrolling the ſlave's name in the cenſor's rolls, by order of the maſter.

This method was out of uſe in Juſtinian's time, and even from Veſpaſian's. Conſtantine, in the room of it, introduced manumiſſion in church. It was uſually done at Eaſter in a public manner, and the act regiſtered. The method by will requires no explanation.

Jamaica, and a king's attorney was bound to proſecute wherever he heard of abuſes. I am ſorry to add, that much more pains were taken in giving the ſlaves a certain degree of religious knowledge, than among our countrymen, which, however, is attended to in the above-mentioned law of Jamaica. How far the French revolution may have improved, or vitiated this comparative picture, I am not prepared to ſay; but, on the whole, I think enough has appeared to ſhew, that the preceding obſervations contain ſomething more than mere declamation.

Vindicta: The maſter twirled the ſervant round, declared him free, and with a blow diſmiſſed him; whence Perſius, Sat. 5. l. 75. *Heu! ſteriles veri, quibus una Quiritem Vertigo facit.* This was done in the preſence of the prætor, whoſe lictor with his wand, called *Vindicta,* tapped the ſlave on the head, who then was free; his name was then enrolled in the liſt of free men, his head was ſhaved, and the cap of liberty put on it. Hence, I ſuppoſe, we paint liberty with a wand, and a cap at the end of it.

Leſs ſolemn methods of manumiſſion were by letter, or writing; to which, however, Juſtinian required the ſubſcription of five witneſſes.

Inter Amicos, i. e. by parol, calling together five friends to witneſs it.

Per Convivium, Where the ſlave was admitted to the maſter's table, it made him free: for it was indecorous for a maſter to ſit down with a ſlave.

By nomination, When the maſter called the ſlave ſon; this mere appellation did not entitle him to the right of an adopted child, but made him free. There were many other of theſe leſs ſolemn modes of manumitting. Hein. p. 20.

Of perſons manumitted, at firſt there were no degrees, all were in equal condition. Afterwards, two remarkable laws were made, *Ælia Sentia, & Junia Norbana,* occaſioned by the improper and guilty villainous perſons who had been often manumitted, and thereby obtained the rights of Roman citizens. By the firſt, perſons manumitted

were put only in the condition of the *Dedititii*, *i. e.* of those people who had surrendered unconditionally to victorious Rome. The latter gave to persons manumitted by the less solemn rites, not coming within the former law, the rights not of Roman citizens, but of the Latin colonists.

Hence, three species of freed men; the first, Roman citizens; the second called *Latini Juniani*; the third, *Dedititii*. The first had the full rights of marriage, could make wills, enter into contracts. The second could not make wills, nor had the rights of marriage; but could, in some measure, enter into contracts. The third had none of these rights, nor any chance of improving their condition.

Justinian took away these distinctions, and retained only this difference between the *Ingenui* and *Libertini*, that while he admitted the latter to the gold ring, the former monopolized the right of patronship. There were restraints also laid on masters, to prevent improper manumissions. No man could manumit to the prejudice of his creditors, nor could persons under twenty years of age manumit, unless under certain conditions, *viz.* that it should be done by the mode of the wand, in the presence of a number of respectable citizens, as before mentioned, and for just cause. These just causes were, if a minor under that age manumitted his relation, his pedagogue, his nurse, or his servant, of seventeen, to be his agent; or

his maid in order to marry her. This age of twenty, Juſtinian changed to ſeventeen.

If manumiſſions had been imprudently made by living perſons, and required the two laws above mentioned, it is natural to ſuppoſe, that they were with more frequent imprudence made by will, to prevent which, the law *Fuſia Caninia* was made.

I ſhould beg pardon for ſuch a nomenclature of the names of the laws, but thoſe which I do mention occur ſo frequently in the Juſtinian code, that it is impoſſible to underſtand it without knowing a little their names and ſubjects.

Modern manumiſſions have been made by parol, or deed of infranchiſement.

CHAPTER IV.

FATHER AND SON.

THE ſtudent of the laws of England may probably aſk, in what reſpect the ſubject of the preſent lecture can be worthy of his attention, or how admit compariſon with our municipal conſtitutions. It is true, the nature and extent of the paternal power at Rome, totally varied from its eſſence and limits among us, and its ſources were there multiplied, as it originated not only in marriage, (its only baſis amongſt us) but alſo in legitimation and adoption. But little as it might be expected, its extent has become the foundation of argument and reaſoning in our courts, even in this century, and particularly in one celebrated cauſe (1). And the doctrine of legitimation, merits ſome attention, not only

(1) I mean that reſpecting the right of educating the children of the heir apparent to the throne, diſputed between King Geo. I. and his ſon, then Prince of Wales, on which occaſion the right of the grandfather to take care of their education, in preference to the father, was *endeavoured* to be ſupported on the rules of the civil law, as tranſpoſed into their own writings, by our Bracton and Fleta. See Forteſcue's Reports.

as having been attempted in early times to be intruded upon us, but alſo as actually being the law in our neighbouring kingdom of Scotland: and the propriety of both this and adoption, is ſurely a ſubject worthy of controverſy, and inviting to curioſity.

We ſhall conſider,

I. The origin of the paternal power.

II. Its extent.

III. The mutual duties of father and ſon.

IV. How it was diſſolved.

The paternal power was acquired by marriage, and birth of children in lawful wedlock.

Secondly, by legitimation.

Thirdly, by adoption.

Of marriage we have treated.

LEGITIMATION.

Legitimation was firſt introduced by Conſtantine. Of this there were five modes.

The firſt was by a ſubſequent marriage, which rule is followed by the canon law, but rejected by ours (2). The civil law, however, only al-

(2) Of this rejection made ſo famous by the ſtern and ſteady anſwer of the barons to the propoſal of this rule, we are to find the cauſes, not in diſlike to the particular doctrine, but in general averſion to the introduction of the civil law. The clergy brought it forward in *limine*, as knowing it to be the moſt palatable and inviting to the barons, who had great numbers of illegitimate children, but

lowed ſubſequent marriage with a concubine, to legitimate the children; the canon with any one.

The ſecond mode was by imperial reſcript. This was introduced by Juſtinian, becauſe the preceding in ſome caſes could not be uſed; for inſtance, where a concubine was dead, or for any other reaſon, could not be taken to wife.

Thirdly, will. This was not ſo much a mode of legitimation, as a teſtamentary declaration, that children were originally legitimate.

Fourth mode, By arrogation (a ſpecies of adoption more particularly to be explained in the ſequel) for a man might adopt not only the children of another, but alſo his own illegitimate children.

Fifth mode, *Per dationem curiæ.* To explain this, we muſt know that the office of Decurion, as it was called at Rome, was an office of honor indeed, but of much labour and trouble, as well

theſe feudal lords ſaw the invidiouſneſs of the propoſal, and rejected a favourite meaſure becauſe it might tend to the general introduction of the civil law, ſo favourable in their opinion to the increaſe of the powers they dreaded, thoſe of the crown and the clergy.

Judge Blackſtone has ſuppoſed many weighty reaſons beſides, which might have ſwayed the barons, and which in his opinion condemn this rule of the civil and of the Scotch law; but is there not much cruelty in refuſing a power to the parent to make reparation to his injured offspring, and in enabling a younger ſon thus enriched to brand his indigent elder brother with the name of baſtard.

as of expence in giving public ſpectacles, &c. The *Datio Curiæ* was making men ſubject to this office; in conſequence they could not reſide out of their town or borough, but were, as may be ſaid, ſlaves of their little *Curia* or ſenate, in their *municipium. Curiæ adſcribebantur, ei inſerviebant periculo ſuarum facultatum;* it is no wonder that men were not ambitious of ſuch ſplendid ſlavery, and muſt be enticed to it by ſuch rewards as legitimation.

It muſt not, however, be conceived that legitimation was always a benefit; the effect of legitimation was undoubtedly, at leaſt in the caſe of a ſubſequent marriage, a right of ſucceſſion to paternal property, but as it alſo reduced the ſubject of it under the paternal power, it might poſſibly, as will be more fully ſeen hereafter, alſo operate as a diſadvantage, and therefore perſons could not be legitimated without their own conſent.

Illegitimate children were of four kinds.

Firſt, thoſe born of a concubine, widow, or virgin *Stuprata,* called *natural children or Nothi.*

Secondly, the children of a harlot, called ſpurious, or *vulgo quæſiti.*

Thirdly, children of an adultereſs.

Fourthly, children of an inceſtuous marriage.

The firſt order only, viz. natural children could be legitimated, for legitimation implies the fiction at leaſt of a marriage; and in the ſecond caſe there was confeſſedly no marriage; in

the third and fourth there could not be one by law.

Illegitimate children were not under the paternal power, but they were not infamous; the natural were capable of holding any honors; the ſpurious were undoubtedly by the people ſomewhat contemned, but not rendered infamous by the laws (3).

ADOPTION (4).

This remarkable cuſtom, (which my Lord Coke ſays was never introduced into England) was

(3) The ſpurious did not bear a father's name, the father being uncertain. Cæſar's ſon by Cleopatra, formed an extraordinary exception, for which Anthony reproached him. S. P. F. in Roman inſcriptions, ſometimes means *Sine Patre Filius.* The civil law as well as ours, empowered the confinement of the pregnant widow, to prevent ſuppoſititious births, and the rule we have formerly mentioned forbidding a ſecond marriage within a year from the death of a former huſband, *infrà annum luctus,* was made to prevent diſputes about the real father; this latter rule alſo prevailed in England until the end of the Daniſh government. If huſband not heard of, woman might marry again after five years, till Juſtinian required poſitive proof of his death; with us ſeven years ſave the felony.

(4) It is not unuſual we all know, even among us, for friendſhip to adopt in effect, the children of ſtrangers in blood; but here is the plain difference, between ſuch acts of friendſhip, and the legal adoption of the Romans; the friend and intended benefactor may change his mind when

not unknown to the Greeks, as alſo to the Aſſyrians, Ægyptians and Hebrews.

The feelings of mankind naturally ſuggeſted this reſource of orbity, and declining, unſupported age looked abroad for that ſtaff which was denied to it at home, but its uncommon and extraordinary prevalence at Rome requires ſome further inveſtigation of its peculiar cauſes in that ſtate. Firſt, it was thought diſgraceful not to keep up and preſerve the domeſtic gods, and ſacred things of the family. Secondly, the rewards offered to the fathers of families, and the penalties on orbity, made men eager for children, and adopted children anſwered the purpoſe. Thus the candidates for honors adopted ſons, in order to have the *jus trium liberorum*, though very often as ſoon as they had obtained thoſe honors, they got rid of theſe fictitious children, by emancipating them, until this trick was ſtopped by a decree of the ſenate, mentioned by Tacitus.

Thirdly, a third reaſon for adoption was to get admiſſion into the plebeian offices, *e. g.* the tribuneſhip, and this did Publius Clodius.

The perſons to be adopted might either be perſons in their own power, or perſons already in the

he pleaſes, but the adopted child at Rome obtained by the adoption legal rights of inheritance and ſucceſſion to the adoptor, of which he could not be arbitrarily or wantonly diſpoſſeſſed.

power of another parent; in the former caſe it was Arrogation (5).

Who might adopt, or be adopted.—Thoſe only who could have been parents, and have had children *in their power* could adopt, therefore eunuchs could not, nor infants, nor women, unleſs by ſpecial licence from the prince. Younger perſons could not adopt their ſenior, but the adopter muſt have been eighteen years older than his adopted ſon,—thirty-ſix than his adopted grandſon; even if they were thus qualified, ſtill they muſt have been perſons who wanted this ſolace of old age, therefore if they were ſtill capable of having children, (and all perſons under ſixty were ſuppoſed capable) or if they had already natural children, they were not intitled to this indulgence without particular licence. The conſent both of the adopted child and of the natural father muſt be obtained: laſtly, no man could adopt a grandſon without the conſent of his ſon, if he had one, for he was not to force an heir upon his ſon; nor could illegitimate children be adopted; ſo that adoption was much more limited in Rome, than is I believe generally imagined.

(5) They were therefore thus defined, *Adoptio, eſt actus ſolennis, quâ in locum filii vel nepotis, adſciſſicitur is, qui natura talis non eſt, vel adoptio eſt actus legis quâ liberos qui in poteſtate parentum ſunt, adoptamus imperio magiſtratus.*

Adrogatio, eſt actus quo homo ſui juris auctoritate ſummi imperantis, in patriam alterius poteſtatem redigitur.

Arrogation was ſtill more ſo, for it was confined to adults, becauſe the conſent of the perſon arrogated was neceſſary. Antoninus Pius, indeed, permitted the arrogation of perſons under the age of puberty, but not without the conſent of relations, or of guardians, and an examination whether the arrogation was for the advantage of the minor. He added theſe further conditions, that if the arrogated died before puberty, his goods (6) ſhould go in the ſame ſucceſſion as if he had never been arrogated; and if his father emancipated him without cauſe, he was to reſtore to him all his property, and to bequeath to him moreover a fourth part of his own. Beſides theſe reſtrictions, none but Roman citizens could arrogate, and that only at Rome: the tutor could not arrogate his pupil; and neither woman nor foreigner could be arrogated, but women might be adopted.

Form of adoption.—Adoption was done before a magiſtrate, but might be done any where: the rite of adoption conſiſted in three ſales from the natural father to the adopter, *per æs et libram*, in the preſence of the balance-holder, the anteſtatus and five witneſſes, ceremonies much reſembling thoſe which attended the making of wills among the Romans (7). There was another mode of adop-

(6) Goods, *bona*, in the civil law, mean all a man's eſtates and property, not merely chattels, as with us.

(7) This form of adoption we find in Suetonius, when Auguſtus adopted Caius and Lucius.

tion, viz. by teſtament; but this could ſcarcely be called ſo in ſtrictneſs, ſince it did not reduce the deviſee under the power of the adopter; it was rather a conditional bequeſt of the inheritance, on condition of bearing the teſtator's family and name: hence, to acquire other rights, a regular adoption was neceſſary. Thus we find that Auguſtus, though adopted by Julius's will, took care to have it confirmed by a law; and Tiberius, though directed by will to bear Auguſtus's name, yet, after the death of Caius and Lucius Cæſar, was by Auguſtus regularly arrogated.

Form of arrogation.—Arrogation was a much more public act than adoption; it was always done in the *Comitia Curiata*, becauſe it was conſidered as a matter concerning the people (8), and to be to them referred. The reaſons of ſo conſidering it, and inſiſting upon its notoriety, were theſe: As the right of inheritance was to be transferred, it ought to be public, to prevent frands upon lawful heirs; and beſides, as the name of the perſon arrogated was ſtruck out of the tables of the Cenſus, and he reduced under the power of another, this was not to be done without the conſent of the

Heineccius makes a queſtion, whether ſolemn adoption would not to this day be valid in Germany? Something like adoption is frequent in that country, viz. the putting ſtep-children on a par with own children by the decree of a magiſtrate.

(8) It derived its name from the *Regiatum ad populum ſata.*

people. The pontifices took care that the perſon arrogated ſhould not be impoſed upon, or do any act to his diſadvantage, and examined whether the arrogator was entitled to this privilege; this done, the votes of the people were taken. In later times the emperors took upon themſelves, more eſpecially as they were *pontifices maximi*, to arrogate by imperial reſcript.

Effects of arrogation and adoption.—Both brought the party, until Juſtinian's time, under paternal power of their new father, gave a right to his name, to a participation of his ſacred things and rites, and right of inheritance (9); but while the adopted child thus became entitled to the property of his aſſumed parent, he loſt all claim to that of his natural father; he was alſo raiſed or depreſſed into the rank which his new father held (10). Juſtinian gave a mighty blow to adoption, by giving the adopted all the rights of ſons, without the adoptor having the paternal power, unleſs he was a perſon in the aſcending line, adopting a deſcendant, for it was not unuſual for a grandfather to adopt a grandſon.

(9) At leaſt of ſucceeding to the *agnati*.

(10) Thus Livy mentions that Cornelius Coſſus was elected Military Tribune with conſular power, at a time when this office was not open to plebeians, which privilege he obtained by being adopted out of the Licinian, which was a Plebeian, into the Cornelian, a Patrician family.

Parental Power—Duties of Father and Son.

By the Twelve Tables, the father had a power of life and death over the ſon, of ſcourging, impriſonment, and ſending in bonds to country labour, and, even if neceſſitated by hunger, of ſelling and mortgaging him (11); but this power was reſtrained by the Imperial Conſtitutions, and by cuſtom and judicial interventions at earlier periods, and parents ſeverely puniſhed that put their children to death, no power being left to them but that of moderate correction, and diſinheritance for *cauſe expreſſed;* and this paternal power did not ceaſe with the minority of the ſon; he could not ſue the father, nor any one elſe without the father's conſent; no action lay againſt him while under the paternal power, but muſt be brought againſt the father; whatever he acquired,

(11) The power of a Roman father over his child was peculiar to that ſtate. Dion. Halyc. has proved that the Greeks knew no ſuch thing, at leaſt not in the ſame degree, nor the Perſians, though the latter exerciſed a very auſtere authority over their children. For a father's power by the Moſaic law, ſee Deuteronomy, ch. xxi. This power originated in a law of Romulus, though admitted into the Twelve Tables as an ancient cuſtom; but all the laws of the kings which were retained, were retained as old cuſtoms, not as regal laws, *ex odio inſigni regii nominis*; the father did not puniſh, however, without trial; it was in reality a domeſtic court.

he acquired to the father's advantage; there could be no civil obligation contracted between him and the father, for they were as one perſon; he could not marry without the father's conſent, nor without his approbation make a *donatio mortis cauſa*, nor a will, even with his father's conſent, except of ſuch property as he got in the wars, called his *peculium caſtrenſe*; with reſpect to the father, they were conſidered as *things*, not as *perſons*, but with reſpect to others as perſons, herein differing from ſlaves, who were regarded as *things* in whatever light conſidered; as long as the law allowed him a power of ſelling them, he might do ſo three times, ſo that, if manumitted by the buyer, they would twice fall back into his hands, which is worthy of obſervation, becauſe it accounts for ſome of the Roman forms of emancipation, &c. Theſe extravagant powers could not have been congenial to an arbitrary monarchy, and accordingly we find them gradually diminiſhed by the intervention of the emperors (12). There was no ma-

(12) Trajan emancipated a ſon that was cruelly treated by his father, and deprived the father of the ſon's property. Adrian baniſhed a father who killed his ſon in the chace on ſuſpicion of adultery. At length, by Valentinian, the power of trying the offence of a ſon was entirely transferred to the magiſtrate. Sons were put to death with impunity down to the time of Auguſtus.

Conſtantine permitted, on account of extreme poverty, to ſell their children when juſt born; but he did this to prevent

ternal power, becauſe ſhe alſo was in the power of her huſband (13): this power continued during the life of the ſon, and did not ceaſe even on his arriving at the greateſt honours, ſome very particular ones excepted, for which ſee Novels 81. ch. 1. ſuch as the conſular dignity, or being made a biſhop; but while in public office, his duties to the public naturally abated and interrupted a little the father's authority: the father was bound to

their being expoſed or murdered; and, to prevent the neceſſity, inſtituted poor laws.

With reſpect to childrens' acquiſitions, the privilege of reſerving whatever they gained by military ſervice was at length extended to every adventitious gain of theirs, ſuch as a bequeſt or a ſalary.

(13) The Engliſh and Iriſh laws give the father only a moderate power of correction and reſtraint until the age of twenty-one, which he may in part transfer to a tutor or ſchoolmaſter. His duties to them are protection, education, and maintenance, until able to maintain themſelves; when able to work, if the parent maintains them, that parent is entitled to the profits of their labours, but has no power over their eſtates (if they have any), further than as guardian or truſtee, and muſt account for the property when they come of age. A mother is entitled to no power, but only to reverence and reſpect. In England, by the poor laws, peculiar obligations are impoſed. The civil law did not oblige a father to maintain the offspring of an inceſtuous marriage, though it impoſed the reciprocal duty on the child. The canon law and ours do not diſſolve the parent's obligation in any caſe.

educate the ſon according to his ability, and to ſupport and protect his children, and alſo his grandchildren. The child, if he had a ſeparate property or peculium, was to ſupport the father if neceſſary, and bail him if impriſoned, but was not otherwiſe obliged to pay his debts. A man was obliged by law alſo to relieve his poor brothers and ſiſters, but not more diſtant relations (14).

The paternal power was diſſolved by the natural or civil death of the father, or by emancipation (15).

(14) A law much reſembling that of China. Lord Macartney's Embaſſy, chap. 4. vol. 2.

(15) The civil death was by deportation, relegation, or becoming a ſlave of puniſhment, terms occuring ſufficiently often in the claſſics to deſerve diſtinction. Deportation was a perpetual baniſhment, depriving the baniſhed of the rights of a citizen. Relegation might be perpetual or temporary, but did not deſtroy the rights of citizenſhip. The ſlaves of puniſhment were thoſe condemned to the mines, or ſentenced to be deſtroyed by wild beaſts. The parent taken priſoner did not loſe the parental power, it was only in ſuſpence till his return: he who returned from captivity was ſuppoſed never to have been abſent, by a fiction called *jus poſtliminii*. Relegation differed from exile, for the exile was deprived of the rights of citizenſhip: hence Ovid. Triſt. 2. Ipſe relegatus non exul dicor—ſee alſo Livy, lib. 4. ch. 4.—men were driven from their country by the interdiction of water and fire, for no man could *directly* be forced into exile, but only by the circuitous method of forbidding to him the neceſſaries of life. The French, in their ridiculous affectation of ſimilarity to the Romans, have of late ſtudiouſly uſed the terms of deportation, &c. &c.

Emancipation—a ſound ſo pleaſing to modern ears—did often at Rome convey a very different meaning: the child, though freed from the parental power, loſt the right of ſucceſſion to the parental eſtate; it was to him frequently a ſound of woe and of diſinheritance; he therefore could not be emancipated againſt his own conſent, but for ſufficient cauſe, nor refuſe to be emancipated if the father ſhewed ſufficient reaſons. On the other hand, where emancipation was deſirable, he could not force it, except for juſt cauſe, ſuch as immoderate cruelty.

The party coveting it had to labour through not only his father's but his grandfather's chains. Firſt, if the grandfather was living, the father and the ſon were in the power of the grandfather; and the father had not this ſpecial power over his own ſon, till the death of the grandfather, becauſe the father himſelf was a dependant (16). The

(16) Upon doctrines like theſe were founded the poſitions in our ancient books, relied upon by the advocates for King George I. in the famous conteſt before-mentioned between his Majeſty and the then Prince of Wales, about the education of the Prince's children.

The ſon of a daughter was not in the grandfather's power by the civil law; nor with us, ſays Co. L. 84. 6.

The court of chancery has often interfered with and controuled the parental power. Vide 2 Brown, Ch. Cas. and 4 Brown, ditto; ſo the courts of law by Habeas Corpus.

A child has been taken from a grandfather, and put under a mother's power. Melliſh and Da Coſta. 2 Atkyns, 14.

grandfather might even emancipate the ſon, and retain the grandſon in ſubjection; and vice verſa, his emancipated grandſon would, upon his death, fall back under the father's dominion: ſuch and ſo extenſive was the ſlavery of children in that region of boaſted liberty. Even marriage did not emancipate the daughter, though ſhe owed her huſband reverence, and was obliged to work for him. But to dwell longer on this obſolete ſubject would be as tedious as uſeleſs; I therefore omit a deſcription of the form of emancipation, further obſerving only, that ten years nonuſage made the ſon free, without any form (17), and that the

(17) In Juſtinian's time it was done by a ſimple declaration before a magiſtrate. Though the ſon by emancipation loſt all ſtrictly legal right to the paternal eſtate, yet he ſoon, by the Prætorian power, was enabled to enforce his equitable claims, and the father ſucceeded to the eſtate of an emancipated ſon, though not as father, yet as patron. The privileges ſo often alluded to on account of number of children called uſually the jus trium liberorum (though five were requiſite to give them in the provinces, and four in Italy out of Rome), were excuſed from guardianſhip, preference among candidates, precedence in office, and an immunity from all perſonal duties.

Under this head appears in the Inſtitutes the firſt direct mention of the celebrated *jus poſtliminii*, the parent loſing his paternal powers by captivity, and recovering them with his liberty recovered. It is thus deſcribed in the Inſtitutes: "Poſtliminium fingit eum qui captus eſt, in civitate ſemper "fuiſſe." Inſt. lib. 1. tit. 12. And thus defined in the

practice of fathers putting their children to death is admitted to have taken place, at ſo late a period as the time of Auguſtus.

Pandects, lib. 49. tit. 15. "Jus quo perinde omnia reſti-"tuuntur jura, de ſi captus ab hoſtibus non eſſet."

CHAPTER V.

GUARDIAN AND WARD.

WE have now traverſed the two leaſt uſeful and moſt obſolete departments of the civil law, and ſhall for the future tread on more fruitful ground. Their law of guardianſhip, though in many reſpects different from ours, ſeems to have afforded many uſeful hints, which were accepted by our early juriſprudence.

Minority at Rome did not ceaſe till twenty-five, and as education is a public concern, guardianſhip was made a public duty, which no man could refuſe, without ſufficient excuſe, under pain of heavy fine (1).

No minor could appear but by guardian. If he had a diſpute with his guardian, a curator ad litem was appointed. Code, lib. 5. tit. 44.

Otherwiſe by the common law, where the diſpute was with his guardian. See Ayliffe.

(1) This compulſion, and the different period for full age, are the great diſtinctions between the Roman guardianſhip and ours.

Guardians were appointed not only to infants, but to idiots, lunatics, women, and even prodigals.

The magiſtrates (2), either aſſigned the guardian, or confirmed the one appointed by the individual or by the law.

The guardian was either a tutor or a curator; the tutor had the charge of the perſon, the curator of the fortune of the ward. Such is the ſenſe in which theſe words are underſtood by Mr. Blackſtone, and certainly is their meaning in our ſpiritual courts; but they frequently, and, I think, moſt uſually mean, in the civil law, the tutor a guardian till puberty (3), the curator from thence to twenty-five: the firſt appointed for the minor, the latter choſen by him.

Guardians were (as with us) ſometimes appointed by the will of the father, ſometimes by the diſpoſition of law, and ſometimes by the office of the magiſtrate, and were accordingly ſtiled teſtamentary, legal, or dative (4).

(2) Theſe magiſtrates were the conſuls in the time of Claudius. Pliny ſays, he was thus appointed in Trajan's time. Plin. Epiſt. ix. 13. Antoninus gave the appointment to the prætors only.

(3) *i. e.* Till fourteen in the man—twelve in the woman.

(4) The ſeries of guardians, known to our law, has been thus neatly epitomized by Mr. Fonblanque:

Firſt, *Jure naturæ*, the father or mother of their heir apparent till twenty-one.

Teſtamentary guardians could only be appointed to children or grandchildren under puberty, in

The nature of the guardian *jure naturæ*, which in the eye of the law is confined in the manner here ſpecified, ſeems not to have been clearly underſtood, till Mr. Hargrave publiſhed his celebrated note on Co. Lit. 88. b. The uſage in common converſation of calling parents the natural guardians of their children, however abſtractedly true, is not true in law: after the infant's age of fourteen, they have no power of guardians. They are pointed out by nature as the natural perſons to be *appointed* guardians of their children; but, until application be made to the court to appoint them guardians, they are not legally ſo.

Yet in 2 Atkyns, 15. 3 P. Wm. 152. and 1 Veſey, 158. Lord Hardwicke is made to ſpeak of parents as guardians even by nature of their daughters.

Secondly, *In ſocage*, the next of kin *to whom the lands could not deſcend*, and this was only till fourteen, and of things that lie in tenure.

Thirdly, By the ſtatute (14 and 15 Ch. II. ch. 19. in Ireland), the appointee in a father's will. This extends to all the minor's eſtates, and may be till twenty-one, or any leſs time.

Fourthly, By cuſtom.

Fifthly, The perſon appointed by the ſpiritual court, of perſonal eſtate only.

Sixthly, The King, for allegiance and protection are reciprocal. Thus far Mr. Fonblanque.

The reſtriction on the guardian in ſocage, that he cannot be a poſſible heir, is the great triumph of the common law-

the power of the appointer, and being his natural heirs; they might to posthumous children, who were deemed already born, as to every thing that respects their advantage.

If, however, a mother or patron, or other person, after having devised their property, appointed

yers, who say, that the civil law, by a contrary regulation, agnum lupo committit; a triumph, however, which Lord Macclesfield, 2 P. Wms. 262, said was worthy only of a nation yet uncivilized. Solon, however, was of the same opinion with the English lawyers—Lycurgus with the Roman. Charondas separated the care of the person and estate, giving that of the latter to the next heir. Many causes induce applications to the spiritual court to be appointed tutor or curator, e. g. where a deceased person has left children under age, and no person willing or legally entitled to administer, it may be necessary for some friend to be appointed curator in the spiritual court, in order to lay a ground for applying for administration.

A testamentary guardian must, by the statute, enter into recognizance in chancery for the faithful execution of his trust. Chancery can check and punish offences in guardians: upon bill, if the minors are not wards of chancery; upon petition or motion, if they are. Wards of chancery are e. g. those whose guardians are appointed by the chancellor, or whose estates are trust estates in settlement. Chancery can remove guardians for breach of trust, or appoint others. The power of appointing a testamentary guardian is not extended by the statute to mother or grandfather. Where minors, not wards of chancery, guardians may be proceeded against by information, 2 P. Wms. 562.

by will a guardian to the deviſee, though the appointment was not good in ſtrictneſs of law, yet, upon application to the proper magiſtrates, it was confirmed unleſs cauſe ſhewn, and ſo even in caſe of a ſon previouſly emancipated. And if there was any defect in a parent's appointment, where the intention was clear, the magiſtrate was ready to ſupply the deficiency.

Legal guardians. If there was no teſtamentary tutor or guardian, the *legal* ſtepped in of courſe. So if the teſtamentary died, or was a temporary or conditional one, he was ſucceeded by the appointee of the law. The legal tutor was of four kinds.

Firſt, The next heir.—A rule, as we have obſerved before, ſo much and ſo unjuſtly condemned by the Engliſh lawyers (5); if there were ſeveral relations equal in degree, a joint guardianſhip (6) was granted with benefit of ſurvivorſhip; but if the firſt guardian or guardians were dead, they were not ſucceeded by their next of kin, but by a new guardian appointed by the magiſtrate (7). The mother or grandmother were, however, ſometimes preferred to the next male heir.

(5) To this may be compared our guardian in ſocage.

(6) With us, of thoſe of equal degrees, the eldeſt will be preferred as guardian. 1 Inſtit. 88.

(7) With us, if, before a minor arrives at fourteen, guardian in ſocage dies, the guardianſhip ſhall not go to an executor, but to the ward's next of kin. Pl. 294.

Secondly, The patron.—The patron was the natural heir of the ſlave, who was made free; he was obliged, therefore, to undertake the guardianſhip of the freed perſon of a minor, becauſe, as he reaped advantage, he was alſo to bear inconvenience (8).

Thirdly, the parent.—If the child was manumitted while a minor, the parent became his legal guardian (9).

Fourthly, The fiduciary tutor or guardian.—This was the ſon of a deceaſed parent, who had manumitted his children or grandchildren, and ſo, as in the preceding caſe, had become their legitime guardian. On ſuch parent's death, his ſon became fiduciary tutor, both to his brothers and brother's children, and to his own, if they had been emancipated by the grandfather.

The legitime and dative tutor took an oath nearly reſembling that of our executors and adminiſtrators, to adminiſter faithfully, and to render a juſt account when required: they alſo were obliged to give ſecurity, and to make an inventory of the minor's effects to be atteſted by a public notary and other witneſſes; beſides, all their effects were tacitly pledged for the due execution of their truſt.

(8) To this may be compared the guardianſhip of old, veſted by our laws in the lords of manors.

(9) As with us, he is guardian by nature and for nurture.

Juſtinian ordained, that where the property did not exceed five hundred ſolidi, the inferior magiſtrates in the provinces, together with the biſhop, might appoint guardians (10).

The duty of a guardian nearly approached to that of a father (11); he was bound to take care of the ward's perſon and eſtate, as far as a careful and diligent father would, and to lend his autho-

(10) Code 1. tit. 4. De Epiſcopali Audientia. Mr. Hargrave diſputes the rightful origin of the power of the modern chancellor to appoint guardians to infants. Mr. Fonblanque vehemently ſupports it. It is aſtoniſhing that neither of them has obſerved how naturally this power was ſuggeſted by that of his prototype and model, the Roman prætor, as that of the eccleſiaſtical courts to appoint curators, was by the above-mentioned power given by Juſtinian to biſhops. Such a power, though not given by ſpecial commiſſion in Ireland, any more than in England as to minors, as it is with reſpect to idiots and lunatics, cannot now be doubted; and, indeed, the extreme care of minors, and vigilant enforcement of the duty of guardians, which has of late years done ſo much honour to the chancery of Ireland, would make it a melancholy queſtion, if it could.

(11) For the Engliſh law reſpecting duties and powers of guardians, ſee among others particularly the caſes of Dagley *v.* Tolfeny, 1 P. Will. 283. Duke of Beaufort *v.* Berty, 1 P. Will. 702. Goodall *v.* Harris, 2 P. Will. 560. Palmer *v.* Danby, Prec. in Chan. 137. Wray *v.* Williams, Prec. in Chan. 151. Ward *v.* S. Paul, 2 Brown, 583.

The act of a guardian, where a reaſonable one, is as valid as if done by the infant at full age; otherwiſe, if wantonly done without any real benefit to the infant. Pierſon *v.* Shore, 1 Atkyns, 480.

rity when neceſſary. As to the firſt, he was to take care that the ward was properly educated according to his quality, either at his mother's houſe, if he had one, until ſhe married a ſecond huſband, or in ſome other ſuitable place, to be judged of, if neceſſary, by the prætor. Teſtamentary guardians, or thoſe appointed by the magiſtrate upon inquiſition, had already received an approbation, and were not to be doubted.

The guardian was not to alienate lands or moveables of the minor's of any conſiderable value without the decree of a magiſtrate; he might ſell things periſhable, but ought not to be a purchaſer himſelf, except at open auction (12): he received debts due to, and paid debts due by, the minor (13); he was not to let the minor's money lie dead, but to employ it to uſe: if he did not, it was preſumed that he uſed it himſelf (14), and he was liable to

(12) Lord Hardwicke ſaid it was improper for a guardian to purchaſe his ward's eſtate immediately on his coming of age; but if he paid the full conſideration, it could not be ſet aſide. Oldin *v.* Samborne, 2 Atkyns, 15.

(13) Guardian may, without the direction of a court of equity, pay off a mortgage, or the intereſt of any other real incumbrance. Prec. in Chan. 137.

(14) By the law of England he is not obliged to put out at intereſt the minor's money, without the authority of chancery, and if he does, it is at his own riſk; but as he muſt account annually in chancery, if he neglects to do ſo, and thereby to empower the court to put out the money, he may be charged with intereſt.

intereſt. This was the law by the Digeſt, though afterwards altered by the Code: he was not to ſuffer by accidents (15); but if he brought vexatious actions knowingly, the loſs muſt fall upon him: he could not give up any rights of the minor (16); if he advanced his own money in defending them, he was entitled to intereſt (17). At the minor's age of twenty-five, his authority ceaſed.

The minor could do no act legally without the approbation and authority of his tutor; he might indeed receive gifts, but he could not enter into contracts: if he did, he was not bound thereby, although others might be bound to him. But if he took upon himſelf to contract, and therein gained advantage by fraud or deceit, he was bound. So if, being in partnerſhip, his partner laid out money, and thus improved the common ſtock, he was bound to advance his proportion (18). In

(15) He is not to ſuffer by accidents. 8 Co. 84.

He ſhall have allowance of all reaſonable expences. Co. L. 89.

Guardian muſt keep down the intereſt of a mortgage out of the profits. 2 P. Wms. 279.

(16) Infant's anſwer by his guardian, no evidence againſt him. Carthew 79. 3 P. Wms. 279.

(17) At twenty-five full age was attained, and until forty-ſix every perſon was deemed and ſtiled young—a comfortable rule for thoſe who do not like to be thought old.

(18) With us, he may go in debt for neceſſaries, without the authority of his guardian. So, for inſtruction, may

all other caſes, the confirming authority and interpoſition of his guardian was abſolutely neceſſary. He could not be an inſtrument in the transfer of property, either by alienating his eſtate, or borrowing (19) or lending money, nay, not even by paying it; for the law went ſo far as to ſay, that if he paid a debt without the authority of his guardians, it was no payment or diſcharge. His eſtate, though it could not be alienated by himſelf or guardian, might be ſold by a creditor to ſatisfy a mortgage debt; he might indeed, when of age, confirm a ſale made during minority, either by expreſs words or tacit acquieſcence for five years from that period (20). Any controverſies touching the eſtate of the minor were to be poſtponed to his age of puberty (21). Guardian could not

convey as truſtee or mortgagee, under the authority of the court: if ſeiſed of an advowſon, church muſt be filled; but he cannot go into trade or partnerſhip. He may contract without his tutor's authority, and his contract is not void as at Rome, but voidable on his coming of age; but there is a likeneſs to the Roman auctoritas tutorum in the neceſſity of ſueing and being ſued by his guardian.

(19) The Senatus conſultum Macedonicum, which forbad any action or demand on account of a loan to minors, even after their fathers death, has been particularly introduced to our notice by Lord Hardwicke, in the remarkable caſe of Lord Chefterfield *v.* Janſſen, 2 Veſey, 125. This decree took its name from Macedo, a famous uſurer.

(20) Four by the Scotch law.

(21) *i. e.* In the language of our law, the parol demurred

be called to an account till his guardianſhip expired (22); but, of courſe, might account if he pleaſed. Theſe proviſions are found in 1ſt book Inſt. and 26 and 27 Dig.

Curators.—When the minor arrived at fourteen, he was freed from tutorſhip, but might take a guardian till twenty-five, called a curator, and latterly was obliged to do ſo. Curators were alſo appointed to idiots, lunatics, prodigals, and women. Alſo to take care of the eſtate of a lurking debtor, of a priſoner of war, or an heir in utero (23).

Perſons forbidden to be guardians were the debtors or creditors of the minor—perſons deaf, dumb, and blind—a father-in-law—prodigals—women, except the mother or grandmother—and thoſe who

(22) With us he may by means of a prochain ami; nay, it is ſaid that any perſon may call a father to an account, 2 P. Wil. 119.

(23) Men of twenty, of excellent character, and women even of eighteen, when of exemplary prudence, were often excuſed from having guardians by ſpecial privilege, and latterly the cuſtom of aſſigning guardians to women fell entirely into diſuſe. Lord Hardwicke ſeems to intimate an opinion, in the caſe already quoted, relative to an improvident bargain made by the famous Mr. John Spencer, that the want of the Roman law of curators to noted prodigals, has eſtabliſhed that trade of annuities and poſt obits, ſo univerſally exclaimed againſt, 2 Veſey 129.

appeared to ſeek it, whoſe eagerneſs was juſtly ſuſpected (24).

Legal excuſes were age, viz. ſeventy years—*jus liberorum*—employment in the revenue—abſence on account of the commonwealth—poverty—want of ſkill—profeſſion of the liberal arts—and holy orders. See 1 book Inſt. de ſuſpec. & excuſ. tutoribus. Alſo 5th book of the Code.

(24) If a mother, when guardian, married a ſecond huſband, before ſhe paſſed her accounts, his eſtate ſtood a ſecurity to the minor. Code 8. 18. 6.

CHAPTER VI.

CORPORATIONS.

HAVING diſcuſſed the rights and duties of natural perſons, we proceed to artifical, which are called bodies politic, or corporations. The neceſſity of ſuch bodies is evident, whenever rights ought to be continued beyond the lives of the perſons poſſeſſed of them. That rights ſhould in this manner ſurvive, muſt be often requiſite to the good of the public, and the moſt eaſy and convenient way of keeping them alive is by the creation of ſuch artificial perſons, a kind of intellectual bodies, conſiſting of individual members, but, in the abſtract, diſtinguiſhed from them; all the individuals that have, that do, and that ſhall compoſe the corporation, make but one perſon in law, and that a perſon endued with immortality.

The convenience and neceſſity of ſuch inſtitutions, produced them at Rome ſo early as the reign of Numa(1). They were called colleges or

(1) J. Blackſtone gives the honour of the invention to Rome; Dr. Ayliffe to Athens and to Solon. The latter, I think, is right; and the Pandects ſeem to confeſs it, 47. 22. 4.

univerſities; names there applicable to all kinds of corporations, for whatever purpoſes created, (and even to voluntary ſocieties,) but which, in modern times, have been more uſually confined to thoſe inſtituted for the education of youth, and the advancement of learning.

The civil law divided corporations into eccleſiaſtical and lay, into civil and eleemoſynary; but the diſtinction into aggregate and ſole was unknown to them (2); all their corporations were aggregate, and three were always neceſſary to form a corporation (3). It was eſſential, as it is with us, that the corporation ſhould have a name; for how could it ſue or be ſued, or perform any of its functions, without a name? which is the very bond and link that ties together the combination.

I ſhall now conſider how corporations were created.

Secondly, their powers, capacities, and incapacities.

(2) *Sole* corporations, conſiſting of one perſon and his ſucceſſors, are entirely the invention of modern times.

(3) By the canon law two might make a corporation. Corporations are by our law divided into ſole and aggregate, eccleſiaſtical and lay, civil and eleemoſynary. Univerſities, ſays Blackſtone, are civil, not eleemoſynary, for the ſtipends are not mere donations, but payments for work and labour done; but the colleges in univerſities, ſays he, are eleemoſynary: *now why does not the ſame reaſon extend to ſingle colleges?*

Thirdly, how diſſolved.

Corporations were formed, as appears to me, by the permiſſion or grant of the Prince (4), or, at leaſt, by a decree of the ſenate at Rome; in which reſpect, I have ventured to differ, with deference, from Mr. Juſtice Blackſtone, who ſays, that the civil law differed from ours, in as much as by it corporations, ſays he, *ſeem* to have been erected by the mere act and voluntary aſſociation of the members, provided ſuch convention was not contrary to law, for then it was an unlawful college; it does not appear, ſays he, that the prince's conſent was neceſſary to be actually given to the foundation of them, but merely that the original founders of theſe voluntary friendly ſocieties (for they were little more than ſuch) ſhould not eſtabliſh any meetings in oppoſition to the laws of the ſtate. Now, this is true of common mercantile partnerſhips, or of temporary ſocieties, formed

(4) In England and Ireland the king's conſent, either expreſsly or impliedly given, is neceſſary to the creation of any corporation; and I am the more emboldened in advancing the opinion in oppoſition to Judge Blackſtone, *that the civil law does not differ from ours in this reſpect*, becauſe, by uſing the word *ſeems*, he appears not to have formed a deciſive opinion. The king's conſent with us is impliedly given in the caſe of ſuch corporations as exiſt by common law, and are ſo *virtute officii*, ſuch as biſhops and parſons, or have exiſted time out of memory, ſuch as the corporations of ancient cities. To the exiſtence of theſe corporations former kings are ſuppoſed to have given their concurrence,

for the intereſts of particular perſons, and to continue during their lives; but as to public and permanent communities, intended to be perpetual like our corporations, they appear to me to have been always confirmed by decree of the ſenate, or by the imperial conſtitutions; thus Dig. 3. 4. 1. mentions the corporations of bakers, and of pilots, to have been thus confirmed; and Dig. 47. lib. 22. 3. ſays expreſsly, that every corporation is illegal, *niſi ea vel ſenatus conſulti auctoritate vel Cæſaris coierit*, and I am confirmed in this opinion by the great care taken to prevent unlawful colleges, *i. e.* illegal meetings or aſſociations, which the governors in the provinces were empowered to diſperſe, by powers ſomething like our convention bills, with particular injunctions reſpecting thoſe of the ſoldiery, ſee Dig. lib. 47. tit. 22.

The powers, capacities, and incapacities, of corporations in the civil law much reſemble our own.

Firſt, The corporation thus eſtabliſhed, from its very end and nature, acquired a power of electing new members to repleniſh vacancies.

though, by lapſe of time, no traces of ſuch exerciſe of the royal authority now remain. This power of erecting corporations may be granted by the king to another, for *qui facit per alium, facit per ſe*, his ſubject is but the inſtrument. The chancellor of Oxford has ſuch a power: theſe poſitions are not meant to contradict the power of the three eſtates to erect a corporation by act of parliament; but then the king is a party, and the charter or letters patent ſtill uſually proceed from him alone.

Secondly, The corporation, like a private perſon, might contract, ſue, or be ſued; might grant, but could not purchaſe or receive donations of lands without a licence (5), nor alienate without juſt cauſe.

(5) *Collegium ſi nullo ſpeciali privilegio ſubnixum ſit, hæreditatem capere non poſſe dubium non eſt, lib.* 8. *code de hæred. inſtituen.* Their law, therefore, in general correſponded with our ſtatutes of mortmain, of which it ſeems incumbent here to give a ſhort account; and yet our mortmain acts have always been aſcribed to the principles of the feudal ſyſtem, becauſe alienations to corporate bodies deprived the feudal lord of his chance of eſcheats, ſince ſuch tenants could neither be attainted or die; and of his military ſervices, if the grantees were of a religious fraternity.

The mortmain acts render void all gifts, grants, and alienations, of lands or tenements to any corporation whatſoever, without licence from the king, and even this is not always ſufficient; the principal of theſe having been made before the reign of Henry VIII. (until whoſe reign the power of willing was not general) did not affect deviſes by will. In the ſtatute of wills, therefore, corporate bodies are expreſsly excepted; that ſtatute is in Ireland, 10 Car. I. ſeſſ. 2. ch. 2. but in England, 32 Hen. VIII. The 43d of Eliz. empowered deviſes to corporations for charitable uſes; the correſponding ſtatute in Ireland is 10 Car. I. ſeſſ. 3. ch. 1. and confines itſelf to archbiſhops and biſhops. The Engliſh act, 9 Geo. 2. ch. 36, limits very much *their* ſtatute of charitable uſes, confining the power of granting for ſuch purpoſes to an execution by deed indented, with two witneſſes, made twelve months before the death of the donor, and enrolled in chancery, with an exemption for the two univerſities; confining, however, the

Thirdly, They were allowed to hold eſtates, the common property of the corporation; to have a common cheſt, and, I ſuppoſe, a common ſeal, or ſomething in the nature of it, or elſe it is not eaſily conceived how its will was properly ſignified; but of this I have found no expreſs mention.

Fourthly, They might make bye-laws for the adminiſtration of their own affairs, provided they were not contrary to the ſeveral laws of the empire, or their own private original conſtitution. The exiſtence of this power, though there have been ſharp controverſies among civilians upon

latter to the purchaſe of not more advowſons than are equal in number to a moiety of their fellows. An act ſimilar to this of 9 Geo. II. was never paſſed in Ireland.

With reſpect to deviſes to corporations by will, avoided by the ſtatute of wills, it has been a great queſtion, whether the lands or tenements ſo forfeited would be forfeited to the crown, or would revert to the heir? a queſtion ſtarted in a notable caſe relative to a bequeſt to the college of Dublin.

A method was introduced in the times of popery, of evading the ſtatutes of mortmain by granting for ſuperſtitious uſes, though not directly by name, to corporate bodies, as for obits, chantries, &c. This has been rendered illegal by ſtatute, both in England and Ireland; but they muſt be entirely diſtinguiſhed from charitable uſes, ſuch as for the maintenance of a ſchool, or an hoſpital. It is not within the compaſs of this work, to enumerate the well-known various efforts of eccleſiaſtical ingenuity to evade the ſtatutes of mortmain; to theſe efforts, however, we have been obliged for the doctrine of uſes and truſts, and of common recoveries.

it, is certain, and always inherent in all corporations.

As to their diſabilities, they muſt act by a ſyndic, as with us by an attorney, being an inviſible body, exiſting only in intendment of law; and for the miſbehaviour of the body corporate, its governors only were to be anſwerable in their perſonal capacities; for inſtance, it could not as a body be guilty of treaſon, or forfeit therefor; and in theſe reſpects our laws agree. Corporeal injuries it cannot receive, being intangible; but it may be injured by libels, and puniſh them in its corporate capacity. It could not be outlawed, nor excommunicated, any more than with us; for ſays ſir Edw. Coke, without intending to laugh, it has no ſoul.

Among other inferior incidents, one naturally offers itſelf to our enquiry, viz. How many votes, or what majority of a community, bound the reſt? Mr. juſtice Blackſtone ſays, the act of two-thirds was conſidered as the act of the whole; whereas, with us *any* majority will do. Mr. Wood and biſhop Halifax are of the ſame opinion. My reaſons for differing, and thinking that the act of *any* majority was conſidered as the act of the whole, are contained in the note beneath (6).

(6) I have already noticed one error of Mr. Juſtice Blackſtone, as to corporations; here ſeems to be another. The writers above mentioned refer to but one authority, viz. 3 lib. Dig. tit. 4. c. 3. Now, if it were conſiſtent with our juſt reverence for them, or poſſible to doubt their in-

Corporations were diſſolved at Rome by the prince, by deaths, by ſurrender, by forfeiture. So with us, corporations may be diſſolved by act of parliament, whoſe power is ſaid to know no limits, but is on them very ſparingly aud cautiouſly exerciſed—by death of all the members, vacancies not having been filled up, which is a caſe extremely improbable—by ſurrender of its rights, which corporations will ſeldom think of doing, and ſeldom could, without betraying their

duſtry, we might be almoſt tempted to imagine they never looked at the original, which is *nulli permittitur nomine civitatis vel curiæ experiri, niſi ei cui lex permittit, aut lege ceſſante ordo dedit, cum duæ partes adeſſent, aut amplius quam duæ.* The chapter or title is upon the appointment of a ſyndic or attorney by a corporation; the paragraph relates merely to that one caſe, and requires not the aſſent, but merely the preſence of two-thirds: now, compare with this the two following authorities, which they have not mentioned, *Refertur ad Univerſos, quod fit per majorem partem,* 50 lib. Dig. 17. 160. *& decreta quæ non legitimo numero decurionum* coacto *facta ſunt non valent, lege autem municipali cavetur, ut ordo non aliter habeatur, quam duabus partibus adhibitis,* Dig. lib. 50. tit. 9. 2. 3. *de decretis ab ordine faciendis.* The former authority ſpeaks univerſally; the latter, though ſaid particularly of municipalities, is univerſal in its principle. I do not deny, that the preſence of two-thirds or more was neceſſary; but the voice of the majority of that number ſo-preſent, operated as the voice of the whole.

So again, *Quod major pars curiæ effecerit, pro ea habetur, ac ſi omnes egerint,* lib. 19. Dig. *ad municipia.*

truſt(7). By forfeiture, in conſequence of ſome of their franchiſes, rights, privileges, or duties, being neglected or abuſed; but as ſuch cauſes of forfeiture in general are trifling, and cannot be taken advantage of, but by extreme ſtrictneſs, or *ſummum jus*, and have, when inſiſted on, uſually ariſen from ſiniſter or arbitrary views in government, proceedings to vacate charters, on account of ſuch forfeitures, have been, and are, deſervedly odious. The arbitrary proceedings in the time of the Stuarts, to abrogate the charters of the city of London, and other corporations, from whom they found a determined oppoſition to their encroachments, will ſufficiently explain my meaning.

We muſt not omit among modern queſtions, reſpecting incidents to corporations, powers given by founders to the heads of ſocieties, in ſome inſtances, of putting a negative on the wiſhes of the whole, or greater part of the body, which have been ſo warmly controverted and denied, I think I may ſay exploded, within theſe few years. The power of founders to inſiſt upon unanimous conſent to a corporate act, or to prevent a majority from binding the reſt, unleſs that majority conſiſted of a certain number, had been in England defeated by ſtat. 33 H. VIII. ch. 27. But in

(7) A ſevere cenſure was paſſed in the houſe of commons of Ireland, 1641, on the ſurrender of the charter of the college of Dublin; ſee 1 Commons Journal, Iriſh.

Judge Blackſtone's opinion, a negative power in the heads of colleges remained; his opinion, however, has been much controverted of late, and among thoſe who think him to have been miſtaken, we may reckon the learned profeſſor at Cambridge, Dr. Chriſtian.

We have no ſuch ſtatute in Ireland as 33 H. VIII. ch. 27.; but for the moſt part, eſpecially in colleges, there is no occaſion to reſort to any act of parliament to oppoſe ſuch a claim, but only to the plain words of the corporation ſtatutes (8).

By the civil law, conſonantly with reaſon, if criminality was annexed to the acts of the mem-

(8) If it was undoubtedly given, it might be a queſtion whether, we having no ſuch ſtatute in Ireland as 33 H. VIII. the power could be diſputed? but in moſt caſes where it has been claimed, and particularly in the college of Dublin, there was no occaſion to recur to any act of parliament to defeat the claim, but merely to oppoſe it, by ſhewing from the local ſtatutes that no ſuch power had been granted, and that the claim has been founded in error: this has been done in the univerſity of Dublin, in a recent moſt ingenious legal pamphlet, uſually aſcribed to a very learned member of the ſame, and the opinion of him and his brethren was confirmed by that of the viſitors. Similar determinations have been made by the court of king's bench, Cowper, 337; and by the viſitor of Clare Hall, Cambridge, upon ſimilar expreſſions, which are the uſual language of college ſtatutes, *guardianus*, *magiſter aut præpoſitus & major pars ſociorum*, that they do not give to ſuch head a negative on the proceedings of the fellows.

bers of a corporation, every one of them was involved in it, who was not able to ſhew that he had at the time expreſsly diſſented (9).

One ſpecies of corporations deſerves particular attention, and more ample diſcuſſion of their incidents; colleges framed for the advancement of learning (10).

(9) From this poſition, which I conſider as univerſally applicable, I have been always of opinion, that there is inherent in the members of a corporation, or of the governing part thereof, a power of entering their diſſent from any corporate act in the public regiſtry or records of the body; though I know this ſentiment is by no means general. I ſay diſſent rather than proteſt, becauſe the latter is uſually ſuppoſed to contain the reaſons upon which it reſts, and I ſhould by no means urge, that every man has a right to inſert on the face of the public regiſtry reaſons which may be futile, abſurd, or inſulting to the majority; but it ſeems to me conformable to every principle of reaſon, that he ſhould have a power of expreſſing his diſſent, in defence of his character, as well as protection of his perſon or property.

(10) It was not till after the revival of letters in Europe, that colleges and univerſities began to aſſume their preſent form. Indeed, I think it may be ſaid, not until the thirteenth century, for it is in that century that firſt occurs ſome obſcure mention of academical degrees; much of the honour, however, of founding and putting them into their modern ſhape, is attributed to Peter Lombard, at Paris, and Gratian, at Bologna; the former of whom lived in the eleventh, and the latter in the twelfth century, and probably they were, during thoſe two centuries, making their progreſs from the form of common ſchools in cathedrals and monaſteries, where, for the moſt part, grammar only

Theſe, in their preſent ſtate and form, ſeem to have been entirely the fruits of modern invention. The Grecian youth, who attended the ſchools of

was taught, to the complete conſtitution of colleges, which they attained in the thirteenth century, when they began to confer degrees. It may be aſked, was not Oxford with ſome other univerſities founded as early as the ninth century? It is true, there were numerous ſtudents there, and profeſſors who read lectures in grammar, rhetoric, divinity, philoſophy, arithmetic, geometry, and aſtronomy; but ſtill ſuch ſeminaries of learning were uſually called only ſchools or ſtudies, and were not founded or endowed, or furniſhed with powers of beſtowing public diſtinctions on learning, like degrees, nor did the ſtudents live under the ſame roof. The univerſity of Paris was the firſt which aſſumed the form of our modern colleges, and from thence other univerſities originally borrowed moſt of their conſtitutions.

The civil law claims particular merit in the advancement and encouragement of theſe ſeminaries, for it was at firſt chiefly owing to that inordinate and univerſal paſſion, which ſeized mankind, (after the diſcovery of the pandects at Amalfi,) for the ſtudy of this law, that ſuch numbers flocked to the univerſities where it was taught. The objects of ſtudy in theſe revered communities were divided into four branches: divinity, law, and phyſic, compoſed three of theſe; and the arts and ſciences, cemented under one head, formed a fourth. The power or faculty of teaching theſe was beſtowed by the ſtate to the ſeminary, by the ſeminary to the individual, and hence, in proceſs of time, theſe branches of learning came to be called *faculties*, and the criterion or eſſential difference of an univerſity was the power and licence of teaching the four faculties, the ſuppoſed compaſs of *univerſal* knowledge; hence, in my opinion, even independent of the ſpecial words of its char-

philoſophy and rhetoric, liſtened to teachers not authorized by the ſtate, nor formed into corporate bodies on a public foundation, endowed with cer-

ter, Dublin is properly an univerſity; ſo is Glaſgow, though conſiſting of but one college.

One of the moſt diſtinguiſhing features of modern univerſities, is the power of conferring degrees, of the origin and nature of which no better account, in my opinion, can be found, than that given by Attorney General Yorke, afterwards Lord Hardwicke, in the caſe of Dr. Bentley, who had been degraded from all his degrees by the univerſity of Cambridge: the power of granting degrees, ſays he, flows from the crown; they were originally in nature of licences to profeſſors in ſeveral profeſſorſhips, and are now titles of diſtinction and precedence. If the crown erects an univerſity, the power of granting degrees is incident to the grant; they are not properly freeholds, or civil temporal rights, and though temporal rights be *annexed* to them, yet the univerſity is not thereby deprived of their power of degradation, as a biſhop, though he has a freehold and a ſeat in parliament, may be deprived by his metropolitan. That queſtion, however, was not decided by the court, the proceedings againſt Dr. Bentley having been irregular for want of his being duly ſummoned, and J. Forteſcue, indeed, doubted whether, as degrees proceed from the crown, the univerſity could degrade.

Regents were originally teachers of the younger part of the univerſity, and they were diſcharged of this onus after they had performed it a ſufficient time, and became non-regents; ſee this diſtinction diſcuſſed in the celebrated cauſe of the King *v.* the Vice-Chancellor of Cambridge, on the great conteſt for the office of high ſteward of that univerſity in 1765, between Lord Sandwich and Lord Hardwicke, 3 Burr. 1647.

tain powers and capacities by the founder, ſubject to his laws, and poſſeſſed of funds diſtinct from the honorary fees of the ſtudent.

The title of bachelor, *baccalaureus*, from *bacca lauri*, was introduced by Pope Gregory IX. in the thirteenth century; the idea perhaps taken from the military order, a knight bachelor, ſometimes meaning a young cavalier who had ſerved one campaign, and might be ſaid to have arrived at the firſt ſtep or degree in arms.

I ſhall now proceed to ſpeak of collegiate duties, diſcipline, property, and privileges.

As to their duties, I ſpeak not of the general duty, of promoting ſound religion and learning, nor of the particular injunctions of their ſeveral ſpecial ſtatutes; but of ſuch rules as are preſcribed to them by the canons of the church, or the laws of the land. By the act of uniformity, 17 & 18, ch. 2. no form of prayer but the liturgy of the eſtabliſhed church is to be uſed in any college chapel, *under ſevere penalties.* It is alſo enacted, that all maſters and fellows of colleges, and ſo forth, muſt ſubſcribe the acknowledgement of conformity and allegiance, uſually called the declaration, on pain of diſability or deprivation, and that heads of colleges ſhall alſo ſubſcribe the Thirty-nine Articles, and the book of Common Prayer. By the 1ſt of G. I. ch. 13, in England, all heads and members of colleges muſt take the oaths of allegiance, ſupremacy, and abjuration, in one of the king's courts, ſix months after admiſſion, on pain of deprivation. I find no ſuch act in our ſtatute book; but as the ſtatute of 2 Anne, ch. 6. Iriſh, had enjoined all perſons taking offices, civil or military, to take theſe oaths, (though it is doubtful whether our fellowſhips come within theſe words,) yet we have always thought it prudent to do ſo, as alſo to qualify by taking the ſacrament.

The ſtate ſometimes encouraged the philoſopher ſo far as to give him an aſſigned and fixed ſeat of

The canons require in colleges regular performance of divine ſervice, and adminiſtration of the ſacraments, and enjoin the wearing ſurplices and hoods.

As to diſcipline, the particular mode of it being ordained and regulated by the ſtatutes of each college, our principal enquiry muſt only be, how in general it is to be enforced; and here, beſides the ordinary power veſted in the immediate and reſident governors of the college, there is incident to every college, and indeed to every corporation, an extraordinary or viſitatorial power; what makes this leſs obſervable in moſt civil corporations is, that the king is their viſitor, and as he can only viſit in his court of king's bench, and not in perſon, we confound his viſitatorial power with the exerciſe of it, in and by that court. All corporations have their viſitors, for otherwiſe, without ſuperintendance and inſpection, they might be ſubject to endleſs abuſes; thoſe merely civil by the king, unleſs they have been endowed by a ſubject, and derive all their property and ſubſiſtence from him, in which caſe the ſubject is eſteemed the founder and viſitor, though he obtains the charter of incorporation, of neceſſity, from the king. In eleemoſynary the founder is viſitor, becauſe, though the incorporation comes from the king, the endowment comes from the founder, and therefore he is rewarded with the power of viſitation; it being juſt, that he who has given his property for a charitable purpoſe, ſhould have a power of ſeeing that it be properly applied.

With regard to eccleſiaſtical corporations, the ordinary is the viſitor; this was the rule of the canon law, and is adopted by ours. The king is the ſupreme ordinary, he therefore can viſit the metropolitan, the metropolitan the biſhop, and the biſhop all ſpiritual corporations within his

inſtruction, as the academy to Plato, and the lyceum to Ariſtotle; but their diſciples did not

dioceſe, ſuch as deans and chapters, parſons, &c. who are ſole corporations.

From theſe rules we are to deduce who are the viſitors of colleges or univerſities. Of univerſities being civil corporations, the king is viſitor in his court of king's bench, though ſome ſay they have no viſitor. Colleges are not eccleſiaſtical corporations, though it was held otherwiſe formerly, and though from ſuch opinion, where viſitors were not expreſsly appointed by the founders, biſhops have frequently uſurped the power of viſitation, which is remarkably the caſe of the biſhop of Ely, at Cambridge, who by long preſcription is now become the acknowledged viſitor of many of the colleges there. Colleges then are lay corporations, even though compoſed of eccleſiaſtical perſons, and are ſaid to be eleemoſynary, though the general corporate body of the univerſity is not. The power of viſitation of them, therefore, exiſts in the founder and his heirs, which power they may grant and aſſign over to others, as is done by the king in our ſtatutes to the viſitors there named.

A ſpecial viſitor being thus made, if he does not exceed his powers, *i. e.* if he determines on a matter which comes within his juriſdiction, though his determination be wrong, it is final and concluſive, and there is no appeal. This was decided in a very ſolemn manner, and after much debate, in the reign of King William, in the famous cauſe of Philips and Bury. The caſe was briefly this: Dr. Bury, rector of Exeter college, Oxford, deprived Colman, one of the fellows, for incontinency. Colman appealed to the biſhop of Exeter, viſitor; the viſitor ordered him to be reſtored, the rector and ſenior fellows refuſed to obey the order. The viſitor ſuſpended five ſenior fellows, and deprived the rector for contumacy. He appealed to the king's bench, and the

obtain, in conſequence of their attendance, any privileges ſimilar to thoſe of graduation with us,

principal queſtion was, whether the king's bench had any power to relieve him? Holt, Ch. J. a moſt eminent and public ſpirited judge, thought they had; the three other judges thought otherwiſe; and the opinion of that majority has been the rule of the court ever ſince, who favour the doctrine on this principle, that law ſuits among members of learned ſeminaries ſhould be diſcouraged as much as poſſible, and that it is better that one perſon ſhould ſuffer, than that the diſcipline, government, and peace of the college ſhould be deſtroyed.

The ſame doctrine was held in Dr. Bentley's caſe, who was ſuſpended from all his degrees for contempt of the vice-chancellor; who had iſſued a proceſs againſt him at the ſuit of another famous man, Dr. Conyers Middleton. Bentley applied for a mandamus in the king's bench, and obtained it, becauſe the univerſity, in their return to the conditional order, had not ſet forth that there was a ſpecial viſitor, which, therefore, did not officially appear to the court, who otherwiſe would not have interfered.

But the king's courts may interfere as to the public laws of the land, for the founder can only give the viſitor excluſive juriſdiction as to his private ſtatutes, and the laws of the college; for inſtance, if fellows of a college ſhould refuſe to take any oaths, preſcribed by law, previous to their admiſſion.

The viſitor, however, muſt obſerve his power, and if he exceeds it is liable to an action; if the queſtion be, whether an offence is committed? he is the proper judge, and perhaps of the kind and degree of evidence neceſſary to convict; but if he puniſhes for that which is clearly no offence, does not come within the ſtatute, or is clearly not cognizable under his viſitational power, an appeal lies to

of Nations, who ſeems to lean much againſt modern univerſities. But, perhaps, I may embrace

I ſhall conclude with a few words, on the privileges of colleges; and here, I am ſorry to ſay, that I am forced chiefly to look abroad to Engliſh univerſities. Their civil juriſdiction, that union of civil and academical power, which takes place at Oxford and Cambridge, could not poſſibly exiſt in this great metropolis. But they have many privileges which might be communicable to us: ſome of them highly uſeful; all honourable.

Such are the excluſive privilege of printing certain books, and the concurrent right of printing others, as acts of parliament. 32 Geo. II.

The privileges of perſons who have taken the degree of maſter, with reſpect to holding two livings. The privileges reſpecting poſt letters, not being under the controul of the General Poſt Office, or, at leaſt, only with certain proviſos.

The giving to the univerſities the preſentation to livings belonging to popiſh recuſant convicts. The diſpenſing with reſidence to clergymen, abiding for ſtudy in the univerſities, and the exception in their favour which we mentioned above, as to bequeſts to charitable uſes.

The qualification of property requiſite to enable perſons to repreſent the univerſities in parliament, is diſpenſed with in England with reſpect to members of the univerſities themſelves; but this exception is unneceſſary in Ireland, there being no ſuch qualification act.

In exemption from taxes, we enjoy much the ſame privileges with the univerſities of England; and however flattering it might be to obtain their ſmaller exemptions and privileges, while we rival them in ſound learning and uſeful ſcience, we have little to envy or to lament.

ſome other occaſion of meeting the many and various recent attacks upon theſe celebrated ſeminaries.

The compliment which the law has paid them, of ordering that copies of all books publiſhed ſhall be depoſited in their libraries, which, indeed, extend alſo to the libraries of the four Scotch univerſities, has been, by a late act, extended to the univerſity of Dublin.

Miſcellaneous Caſes reſpecting Colleges, determined ſince the year 1785.

A mandamus lies to a viſitor to hear an appeal and to give ſome judgment, Rex *v.* Biſhop of Lincoln, 2 Term Rep. 338.

The viſitor of Jeſus College, Cambridge, need not hear parol evidence on an appeal; it is ſufficient if he receives the grounds of the appeal, and anſwer it in writing. Rex *v.* Biſhop of Ely, 5 Term Rep. 475.

N. B. The doctrine in the laſt caſe ſeems to be general, but appears ſo extraordinary, that it is to be hoped, from *ſome expreſſions* in the caſe, that it applies only to that particular college.

If no ſpecial viſitor be appointed by a founder, in default of his heirs, the right falls to the king. Rex *v.* C. Hall, Cambridge, 4 Term Rep. p. 433.

Engliſh Statutes allowing privileges to the univerſities, mean only the Engliſh univerſities. Jones and Smart, Term Rep. 449.

It is ſaid, that a viſitor cannot compel a ſpecific performance of an agreement between a college and a ſtranger; nor can a viſitor adminiſter an oath. See Cowp. 378; and Douglas, 342.

As to alteration of ſtatutes, ſee the caſe of Bentley *v.* Biſhop of Ely, in the Appendix.

At Rome, in the times of the emperors, the profeſſors in different ſciences began to receive regular ſtipends out of the public treaſury, to be authoriſed by the ſtate, and to become ſubject to regulations, and a form of diſcipline, by it ordained. Conſtantine, Theodoſius, and Juſtinian, ſeem to have been the chief promoters of theſe plans. The inſtitutions for the purpoſe of teaching the laws in particular, begin from the third century, to offer an appearance ſomewhat reſembling modern colleges. If we had here full leiſure to examine the traces, handed down to us, of the legal ſchools of Rome, Conſtantinople, and Berytus, now Beroot in Phenicia, to which three places Juſtinian latterly confined this ſtudy, we ſhould find ſome ſtrong marks of affinity. We know that the ſtudents in thoſe places went through a courſe which laſted five years, and were divided into five ſeveral claſſes, with diſtinguiſhing names to each; during the firſt, or freſhman year, they were called *dupondii* (11), a name in-

As to college chambers, ſee Attorney General *v.* Stephens, Appendix.

The extenſive meaning of the word mores, in college ſtatutes, the caſe ex parte Wrangham. Ibid.

As to college leaes and fines, the caſe of Wynne *v.* Bampton, 3 Atkyns 473. Ibid.

(11) The lower claſſes have always been ſubject to a joke; in a college in America, where the author was for a ſhort time, the claſs of the ſecond year were called *Sophimores*, compounds of ſenſe and folly.

timating that they were yet of no value; in the ſecond year they read the edict, and were called *edictals;* in the third *papinianiſts*, their ſtudy being Papinian's works; in the fourth λυτοι, from λυειν, as having a power to anſwer queſtions like our bachelors; in the fifth *alutoi.*

In the 11th book of the code, tit. 18, it appears, that no perſons, under pain of infamy and baniſhment, were permitted by law to teach as public profeſſors, though they might as private preceptors in private houſes, unleſs eſtabliſhed by government, and that the government had eſtabliſhed in the capitol a foundation of public profeſſorſhips, viz. one of philoſophy—two of law—three latin profeſſorſhips of rhetoric, four of grammar—five greek profeſſors of logic, and four of grammar, who could not teach privately under the ſame penalties of exile and infamy.

The honors and privileges beſtowed in conſequence of proficiency in ſcience, are every where to be found in the Juſtinian law. The profeſſors and ſtudents were exempt from civil offices, and from the reception of ſtrangers; no noiſy trade could be carried on near theſe ſeminaries, which were uſually called auditories; they were free from all ordinary taxes, and after twenty years (ſome ſay thirty) honourable exerciſe of their profeſſion, were entitled to the rank of count or comes; an honor the nature and degree of which is not very clear, counts, or *comites imperatoris,* being very various in ſtation, power, and honor.

To obtain theſe privileges, among other requiſites, to be matriculated was indiſpenſibly neceſſary; and queſtions have been made, whether a man who was matriculated, and leaves the univerſity with no intention of returning again, afterwards changing his mind, ſhall have any benefit of his former matriculation.

Conſtantine is ſaid to have been the firſt who gave ſalaries out of the public treaſury, though Quintilian, long before, ſpeaks as if he had met with ſome public emolument, in conſequence of twenty years meritorious ſervice.

There was at Conſtantinople, beſides a college for the ſtudy of the law, one for the liberal arts, and both there and at Alexandria were celebrated colleges of phyſicians.

All theſe colleges were liable to viſitation and inſpection; the lay by ſome of the civil magiſtrates, the eccleſiaſtical by the biſhop of the dioceſe, as may be collected from the 83d Novel. and the Dig. 47. 22. 1.

By grammar, ſo often mentioned, was anciently underſtood not merely the rudiments of languages, but claſſical learning in general.

RIGHTS OF THINGS.

THE order purſued in this book is as near to that of Judge Blackſtone as poſſible; but as the civil law knew not the diſtinction between real and perſonal eſtates, the reader muſt not expect to ſee the titles to things real and perſonal ſeperately handled, as they are by him, nor conſequently the ſame title repeated; as for inſtance, by occupancy, by forfeiture, or by will, as he is obliged to do, firſt under the head of Title to Things Real, afterwards of Things Perſonal.

ON THE CIVIL LAW.

BOOK II.

OF THE RIGHTS OF THINGS.

CHAPTER I.

ORIGIN OF PROPERTY, AND DIVISION OF THINGS.

THE civil law does not enter into the minute and ſubtle diſquiſitions about the natural origin of property, which have employed the pens of Grotius, Locke, and Blackſtone. As far, however, as it has touched upon them, it agrees (in the opinion of Mr. Gibbon) with the Oxonian Profeſſor, in deriving it from occupancy. To me it ſeems rather to coincide with Grotius, who deduces it from an implied compact of nations; for, in fact, it ſpeaks of occupation only as one of the titles to property ariſing from natural law, *i. e.* ſays Juſtinian, from the law of nations, ſhewing that he is not ſpeaking of the law of nature univerſally and in the abſtract, *as it operates in a ſtate*

of nature, but *only* as it becomes a part of the law of nations. The language of Juſtinian in the Inſtitutes is this: that all rights to things ariſe from the law of nature, that is, the law of nations, or from municipal law (1). Under the firſt he reckons occupancy, acceſſion, and tradition; under the latter, preſcription, donation, inheritance, &c.

Next to the conſideration of property in *general*, and its origin in the law of nature, natural order teaches us, firſt, to treat of the diviſion of things, then of property in them, and laſtly, of the *particular* modes of acquiring title to them, a method which has been purſued by the clear mind of Mr. J. Blackſtone, and which I ſhall endeavour to follow, eſpecially as Juſtinian here by no means furniſhes a clear model for imitation (2).

(1) Accordingly Mr. Blackſtone ſpeaks of that rule of the *law of nations, recognized by the laws of Rome*, Quod nullius eſt, id ratione naturali occupanti conceditur.

(2) Juſtinian, in his Inſtitutes, is in this reſpect extremely immethodical; for, in the firſt chapter of his ſecond book, he begins with the diviſion of things—then proceeds to the titles to them acquirable by the law of nature and nations—and in the ſubſequent chapters of the ſame book returns to diviſions of things, and to quantity of intereſt in them, thereby poſtponing the enumeration of the other methods of acquiring property, viz. thoſe by municipal law, and awkwardly ſeparating theſe titles to property from the former, *i. e.* from thoſe ariſing from the law of nature and nations, by the interpoſition of the chapter of corporeal and incorporeal things, and of ſervices, uſufruct, and uſe.

In their diviſion of things, the Roman juriſts are much more minute, accurate, and metaphyſically exact, than ours: things were, according to them, either *in patrimonio*, capable of being poſſeſſed by ſingle perſons excluſive of others, or *extra patrimonium*, incapable of being ſo poſſeſſed.

Things *extra patrimonium* were common, *i. e. free to all mankind*; public, *i. e. belonging to ſome nation or people*; univerſitatis, *i. e. belonging to ſome certain city, ſociety, or corporation*; or, fourthly, things nullius, *belongiug to nobody*, which included all things conſecrated and devoted to religious uſes, which are diſtinguiſhed into ſacred, ſanct, and religious.

This was the diviſion of things in relation to their propertyſhip—with reſpect to their nature, they were divided into corporeal and incorporeal—and the corporeal again into moveable and immoveable. This is the order and manner of diviſion choſen by Juſtinian in the Inſtitutes, and we ſhall follow it (3).

(3) The order adopted by the famous Roman lawyer, Caius, and apparently approved in the Digeſts, is ſomewhat different: he firſt diſtinguiſhes things into thoſe of divine and thoſe of human right—things of divine right he ſeparates into ſacred, ſanct, and religious—thoſe of human into things *in patrimonio* and *extra patrimonium*—and under the *res nullius*, a ſub-diviſion of the latter, conſiders not only holy things, but thoſe which, though not conſecrated, wanted a maſter, ſuch as the *hæreditas jacens*. Juſtinian confines the *res nullius* to things of divine right.

Things common to all, are thoſe which, being given by Providence for general uſe, cannot be reduced to the nature of property; ſuch are the air, running water, the ſea, and the ſhores of the ſea. By ſhore, the Inſtitutes mean up to high water-mark, or (where little or no tides, as in the Mediterranean) as high as the higheſt winter wave waſhes (4); but if a man by preſcription, from time immemorial, had the uſe of running water (5), as for a mill, his caſe was an exception to the general rule, but he muſt not waſte the water unneceſſarily, and mills and other buildings might be erected on rivers by particular licence. Vid. Digs. 48. 8.

Things public. Among things public Juſtinian principally notices harbours, banks, and rivers,

(4) Notwithſtanding this poſition of the ſea being common, many nations, in modern times, have claimed dominion over parts of it, as the Venetians over the Adriatic, the King of Denmark over the Sound, and the King of Great Britain over the four ſeas. The learned Selden even contends that the ſea is as capable of becoming property as the land. Undoubtedly, where nations have taken upon themſelves the burthen of freeing the ſea from pirates, or erecting light-houſes on dangerous coaſts, they have a right to reimburſe themſelves by duties upon paſſing ſhips; nor is it to be underſtood that foreign nations have a right to uſe the ſhore of the country againſt the will of the inhabitants, except from inevitable diſtreſs.

(5) By Magna Charta, the appropriating running water, which it ſeems unnatural to reſtrain, was prohibited, conſequently the rivers fenced at that time were directed to be laid open.

and the right of fiſhing in them. By the civil law the rivers were public. Of excluſive rights of fiſhing the Romans had no notion, any more than of game laws (6); and the inhabitants of the waters became the property of the firſt occupant; nor was any obſtruction or diverſion of a river allowed. See Dig. lib. 43.

A bank of a river might have been private property; but it was ſo far public, that all perſons had a right to come upon it for certain purpoſes; for inſtance, for a towing-path (7).

(6) It is their peculiar praiſe, ſays Gibbon. With us, by the feudal polity, the Prince claimed a right of granting franchiſes of *free* fiſhery in rivers, which, by an odd perverſion of language, means excluſive fiſhery; but theſe rights of fiſhery, in conſequence of Magna Charta, muſt be as old as Henry II.'s time. Probably very few of our preſent fiſheries could boaſt ſuch antiquity, or are really legal; but being proved to have exiſted longer than the memory of the oldeſt men living, are preſumed to have been from Henry II.'s time, no proof appearing to the contrary. Many gentlemen in Ireland ſupport their titles to fiſheries by grants from Charles II. but ſuch grants convey nothing, being directly contrary to Magna Charta, and are only corroborating evidence of the rights being from time immemorial.

A ſubject may have by preſcription a right to a ſeveral fiſhery in an arm of the ſea. 4 T. R. 437.

(7) This rule of the civil law, adopted alſo by our Bracton, was much inſiſted on in the caſe of Ball *v.* Herbert, 3 Term. Reports; when, however, it was determined that, by the common law of England, the public are not entitled to tow on the banks of navigable rivers.

Res *univerſitatis*, or things belonging to cities or bodies politic. Such things belong to the corporation or body politic in reſpect of the *property* of them; but as to their *uſe*, they appertain to all thoſe perſons that are of the corporation or body politic: ſuch may be theatres, market-houſes, and the like (8).

Res *nullius*, or things which are not the goods or property of any perſon or number of men, are principally thoſe of divine right: they were of three (9) ſorts—things ſacred, things religious, things ſanct. Things ſacred were thoſe which were duly and publicly conſecrated to God by the prieſts, as churches and their ornaments, their chalices, books, &c.

Things religious were thoſe places which became ſo by burying in them a dead body, even though no conſecration of theſe ſpots by a prieſt had taken place.

Things ſanct were thoſe which by certain reverential awe ariſing from their nature—ſometimes augmented by the addition of religious ceremonies, were guarded and defended from the injuries of

(8) They differ from things *public*, the latter belonging to a *nation*.

(9) For though Caius, in his diviſion of things, makes them to conſiſt of derelicts, treaſure trove, the *hæreditas jacens*, or an inheritance lying before it be entered on or appropriated; yet as theſe are of a private nature, and capable of proprietorſhip, Juſtinian more properly confines the *res nullius* to things of divine right.

men; ſuch were the gates and walls of a city, offences againſt which were capitally puniſhed.

We have now done with things *extrà patrimonium*, and muſt remind the reader, that things *in patrimonio* are divided into corporeal and incorporeal, and the corporeal again into moveable and immoveable.

Corporeal things are thoſe which are viſible and tangible, as lands, houſes, jewels, &c. Incorporeal are not the object of ſenſation, but are the creatures of the mind, being rights iſſuing out of a thing corporeal, or concerning or exerciſeable within the ſame.

Corporeal things are either moveable, as ſilver, gold, houſhold goods; or immoveable, as lands and houſes (10).

Corporeal things may be unoccupied, or held for life, or leſſer term, or in inheritance: in the ſecond caſe, the Engliſh law calls them tenements, in the

(10) Moveables and immoveables are more uſually and technically called, by our law, things real and perſonal: thus Mr. Blackſtone defines, in the ſecond chapter of his ſecond book, things real to be ſuch as are fixed and immoveable; things perſonal to be goods, money, and other moveables; yet, in his twenty-fourth chapter, he is forced to depart from this definition, and to acknowledge that things perſonal include ſomething more than moveables, viz. what we call chattels real (as leaſes for years), which he ſays are of a mongrel, amphibious nature. Such awkward effects ariſe from our diſtinctions of real and perſonal property, and ſo much ſuperior is the ſimplicity of the civil law.

third hereditaments. So incorporeal rights may be tenements or hereditaments, as they are to exift for the life of the individual, or to defcend to his poſterity. The civil law does not make uſe of theſe terms; but yet, like the Engliſh, in the diviſion of things, pays more peculiar attention to thoſe of an incorporeal nature, which we may, if we pleaſe, to keep up the analogy, call hereditaments.

CHAPTER II.

OF THINGS OR HEREDITAMENTS INCORPOREAL.

THESE being very numerous and various, legal writers have uſually ſelected ſome of the principal for diſcuſſion. This Judge Blackſtone has done to the number of ten.

The civilians, though they enumerate many, ſuch as the rights of inheritance and thoſe ariſing from contracts, refer moſt of them to other proper heads, and confine themſelves under this title to what they call *ſervitutes* or ſervices. On this head, therefore, of incorporeal hereditaments, the Engliſh lawyer is not to expect diſcuſſions ſimilar to thoſe of Blackſtone, on rents, commons, &c. but rather upon ſubjects which in the Engliſh law would be ranked and conſidered under the titles of eaſements or nuiſances, for ſo the ſervices of the Roman law would be claſſed by us.

It may be agreeable, however, to the reader, before we proceed to theſe ſervices, to know what the civilians have delivered to us, upon ſome of the

ſorts of incorporeal hereditaments, choſen by Mr. Blackſtone for ſpecial conſideration, which are advowſons, tithes, commons, ways, offices, dignities, franchiſes, corrodies or penſions, annuities, and rents.

On *advowſons* it will be immediately perceived, by the conuſant of hiſtory, little or nothing can be expected. The *jus patronatus*, or right of the perſon who built and endowed a church to nominate the officiating miniſter, appears to have been allowed in the Roman law, Nov. 26. tit. 12, ch. 2. and Nov. 118. ch. 23. but was too young and infrequent to afford room for much diſpute, or conſequently to demand much legal regulation.

Tithes.—The ſame almoſt may be ſaid of tithes. In the earlieſt times of chriſtianity the clergy were ſupported by gratuitous donation; the piety of the times rendered that ſupport ample and liberal, and prevented or anticipated recourſe to any claim of right: that fervour of piety had not ſubſided in the ſixth century, the æra of Juſtinian's reformation of the law. It is not, I believe, any where alleged, that tithes were claimed as a right until the fourth or fifth centuries, though voluntary contributors had often made a tenth the meaſure of their devout remuneration of the ſervices of the prieſthood, and the claim does not ſeem to have been as yet ſo general, or ſo acknowledged, as to employ any chapter in the body of the civil law.

Common, or right of common.—Of this right the civil law treats ſlightly and generally, among the various claſſes of ſervices due by the land of one man to another: it recognizes particularly the *jus paſcendi pecoris*, but does not enter into ſpecial diſtinctions of the different ſpecies of common known to the Engliſh laws.

Ways, or rights of way.—The diviſions here were ſpecial and minute; their rights were either *iter*, *actus*, or *via vel aditus*: *iter* was a right for a man to go on horſeback, or in a ſedan, over another man's land to his own; and where ſuch right exiſted, and the road was out of repair, he who had the right of way might go over any part of the land he pleaſed (1). *Actus* was a right of walking, riding, driving cattle or a cart, over another man's ground (2). *Via*, or *aditus*, included the two former, and ſuperadded the privilege of drawing ſtones or timber, or leading any body of men, over the ground, provided it were done without damage to the corn or graſs, within a ſpace conſiſting of eight feet at leaſt ſtraight ways, and of ſixteen feet upon turnings. All theſe rights of way might, as with us, ariſe from ſpecial agreement—permiſſion or reſervation—by preſcription,

(1) The law of England agrees, ſays Blackſtone; but he is miſtaken, except where the owner of the land is bound to repair. See Doug. 716.

(2) Called in England a pack or prime way.

or from neceffity, where one man's land is entirely ſurrounded by another's (3).

Rents.—All rents could be recovered by diſtreſs, and nothing being known to them analogous to the feodal tenures, conſequently there were no ſuch diſtinctions as rent ſervice, rent ſeek, &c.

The rent might be either in money, or in a certain quantity of proviſions, or in a portion of the fruits. The place and time for paying the rent, ſeem to have been regulated nearly as with us: the time *expreſsly;* it being a general principle of that law, that he who has a term for paying any thing, is not in delay till the laſt moment of that time is expired (4); but it does not ſay with our law, that though the rent be not due till midnight, it ſhall be payable before ſun-ſet (5). The place *impliedly*, it being a general principle alſo, that where no place expreſſed, the thing ſhould be delivered, or paid where it happened to be. Vide lib. 38. Dig. The thing to be paid, therefore, being the fruits, or ſomething in lieu of

(3) A way with us may be pleaded as from neceffity; and in pleading, the kind of way muſt be particularly ſhewn, whether it be a footway, horſeway, or cartway. Vid. Yel. 164. 1 Durn. and Eaſt. 560. 6 Mod. 4.

(4) *Ne eo quidem ipſo die, in quem ſtipulatio facta eſt, quia totus is dies arbitrio ſolventis tribui poteſt.* See Inſt. de Verb. Obl.

(5) With all due deference to all legal writers, this ſounds very like a blunder.

them, I collect that payment was properly made where the fruits were, that is, on the land.

The rent (except in the long leaſes called *emphyteuſes*), was conſidered in the light of hire, or payment for the fruits of the ground, rather than as it is with us, in the nature of an acknowledgment for the poſſeſſion of the land. Hence if the leſſee ſuffered by great and inevitable accidents, whether by the hand of God, or from the hand of man, he was diſcharged from paying rent, during the continuance of the calamity (6); and even if he covenanted to pay his rent notwithſtanding accidents, the covenant extended only to ſuch as might be naturally expected from poſſible changes of weather, &c. and not to ſudden and unexpected events, ariſing from the act of man, ſuch as the inroads of an enemy.

Remedies for recovering the rent.—Theſe were by diſtreſs, by ejectment, or by action, as with us.

(6) Incendia, aquarum magnitudines, impetus prædonum a nullo præſtantur, b. 23. F. de reg. Jur. For the difference of our law in theſe reſpects, and its diſtinctions, ſee a learned note in Fonblanque's Eq. 1. vol. p. 366. Our law does not diſcharge the leſſee from the payment of rent expreſsly reſerved, even though the premiſes be deſtroyed by fire, or demoliſhed by the king's enemies. It ſhould ſeem by certain deciſions that the leſſee would have relief in equity. But of the propriety of theſe deciſions, Mr. Fonblanque ſeems to doubt.

The firſt followed from the principle, that the furniture of a houſe, or the profits of a farm, were always implied by mortgaged for the rent. Vide lib. 4. and lib. 7. Dig. But beaſts belonging to the plough, and other things neceſſary to tilling and cultivating the ground, could not be diſtrained (7), nor the bed or other abſolutely neceſſary moveables of the leſſee; an ordinance dictated by the ſame humanity, which, in the ſixth and ſeventh books of the Pandects, forbids a debtor's wearing apparel, or bed, being taken in execution.

The landlord could ſeize the effects on the premiſes to ſatisfy not only the arrears of rent, but the loſſes by dilapidations, and that whether theſe effects belong to his immediate tenants or to their under-tenants; but the goods of the under-tenant could only be ſeized to the amount of the rent he paid, and if he paid the head landlord, it was a defence in an action by the meſne. F. 13. 7. 11. 5 de pig. act.

The mode by ejectment we find in the Code and Pandects. Vid. 3. lib. Cod. de Loc. and Domat. book 1. lib. 4. we find them ſpeaking of *colonum ejectum penſionum debitarum nomine*; and which is remarkable, the tenant could not only be ejected for non-payment of his rent, but alſo for damaging

(7) Agreeably to the ancient common law of England.

the houſe, or premiſes, carrying on in them an unlawful trade, or making a bad uſe of them in any other way.

Actions for the recovery of rent.—The mention of theſe frequently occurs (8); they were favourable actions, and of the ſpecies which were called *bonæ fidei* (9).

Beſides theſe ſpurs to the tenant to be punctual in the payment of his rent, he was alſo liable to intereſt upon it, from the time of its being legally demanded.

Having thus ſketched the rules of the civil law on ſome of the incorporeal hereditaments which appeared moſt important to Mr. J. Blackſtone, we ſhall proceed to the conſideration of thoſe which principally attracted the attention of the Roman juriſts, viz. ſervitutes or ſervices.

Services (which, as I have ſaid, either correſpond to what we denominate eaſements, or elſe would rank among rights to be ſecured from particular nuiſances), were burthens affecting lands, or other ſubjects of ownerſhip, whereby the proprietors were

(8) Actions ex locato et conducto.

(9) The Roman law diſtinguiſhed between contracts *bonæ fidei* and contracts *ſtricti juris*. That is, ſome contracts were ſo to be interpreted by the rules of honeſty and conſcience, that they were ſuppoſed to include many things not expreſsly mentioned in the contract, while in others they adhered cloſely to the very letter of the contract.

either reſtrained from the full uſe of what was their own, or obliged to ſuffer another to do ſomething upon or reſpecting it. The former were called negative ſervices, ſuch as that a neighbouring proprietor ſhould not build to darken my windows. The latter affirmative, ſuch as a right to a watercourſe over the lands of another (10).

Services again were defined, rights to which one thing was ſubject for uſe or convenience to another thing or perſon, contrary to common right. They were, therefore, either prædial or perſonal. Prædial were burthens impoſed upon one tenement in favour of another tenement. Perſonal by which property was burthened, not in favour of a tenement, but of a perſon.

Prædial ſervices were divided into rural ſervices, or of lands, and urban ſervices, or of houſes. The rural ſervices of the Romans were iter, actus; via aquæductus, aquæhauſtus, & jus paſcendi pecoris; foot-road, horſe-road, cart-road, dams and watercourſes, watering of cattle, and paſturage or common.

The chief affirmative ſervices of the houſes among the Romans, were thoſe of ſupport, viz. *tigni immitendi, & oneris ferendi.* The firſt, the right of fixing in our neighbour's wall, a joiſt or

(10) In the former of the inſtances here adduced, we ſhould deem it a ſecurity againſt nuiſance, though we have no general term for ſuch reſtraints. The latter we call an eaſement.

beam from our own houſe. The ſecond, that of reſting the weight of our houſe upon a neighbour's wall. There were, however, many others, ſuch as of a way through another's houſe, or up his ſtairs, to apartments not his property; of even overhanging another's ground to protect a houſe from ruin; of carrying a ſink through an adjoining manſion, &c. &c.

Negative ſervices of houſes were infinitely various. One or two examples may ſuffice: ſuch as the reſtricting of a building formed ſo as to darken ancient lights, or to throw rain water from its roof upon another's ground; ſuch as the reſtriction upon injuring the proſpect from a neighbour's houſe, or againſt opening windows which may over-look another's habitation, and deſtroy his privacy (11).

Of perſonal ſervices, or ſervices due from a thing

(11) The term ſervices or ſervitudes is well known in the Scotch law: in England and Ireland, ſuch rights may be created by ſpecial covenant between individuals; and as to many of thoſe above enumerated, they exiſt of common right, e. g. an action would lie for darkening ancient lights, 9 Co. 58. b. and for overhanging another's houſe, or putting up a ſpout ſo that water fall upon another's premiſes, Stra. 634. but not for obſtructing a proſpect, or overlooking a neighbour's retired walk, though I have known a warm conteſt upon the laſt point, which however did not come to a deciſion.

to a perſon, there were particularly noticed, uſufruct, uſe, and habitation.

Uſufruct was the right of uſing, taking, and enjoying, all manner of profits which ariſe from a corporeal thing belonging to another perſon, without any diminution of the ſubſtance or property thereof; it might be in cattle, bondmen, or any thing *not conſumed in the uſe* (12). *Uſe* was a right of receiving ſo much of the natural profits of a thing as was neceſſary to daily ſuſtenance.

Habitation was a right of a perſon to live in the houſe of another without prejudice to the

(12) An *improper* uſufruct might even be of things that periſh in the uſing, as of wine and oil. Our truſts, as Mr. Blackſtone has obſerved, do not correſpond to the uſufructs, but to the *fidei commiſſa* of the Romans. Uſufructs in the Scotch law are called life rents; the intereſts of tenants for life or years, among us, may be compared to the uſufructs of the Romans. Theſe ſpecies of perſonal ſervices, though they may be created by ſpecial agreement, are little noticed among us; but with reſpect to thoſe of a prædial kind, whenever an Engliſh lawyer wiſhes for information on the practice of eaſements or nuiſances under ſpecial circumſtances, he cannot perhaps ſearch for general principles, as well as ſpecial detail, more ſucceſsfully than in the civil law, whoſe diſquiſitions on theſe ſubjects have been much more minute than ours, though the general principles ſo far agree as to make them, I think, almoſt equivalent to authorities among us. To go more minutely into the doctrine would be impracticable in an elementary treatiſe, on my preſent deſign.

property: this was aſſignable, which a uſe was not; and as the houſe could be uſed only for a dwelling, it differed from an uſufruct in it, becauſe the uſufructarian of a houſe might have applied it to any purpoſe, as to a ſtore or a manufactory.

CHAPTER III.

OF ESTATES IN THINGS.

IT has been formerly obſerved, that though the Roman law diſtinguiſhed eſtates in real and in perſonal things, it had no diviſion of eſtates ſimilar to that ſubtle (1) partition amongſt us, into

(1) Though a little foreign to my purpoſe, I cannot help obſerving a confuſion which appears to me ſometimes to ariſe with us as to theſe terms, as if they were always ſynonymous to *freehold* and *chattel*.

Real eſtate, in common parlance, means an eſtate of indeterminate duration, not *neceſſarily* including the idea of immobility, as freehold doth.

Thus an eſtate or property granted to a man and his heirs in an annuity, charging only the perſon of the grantor, is, ſays Blackſtone, vol. 2. ch. 3. a real eſtate. Yet it certainly is not freehold nor chattel; and if it were to a man and his executors, it would not be a real chattel, like a leaſe for years of land, nor a perſonal chattel, like the parchment on which the deed of annuity was written.

So an eſtate, or property for life in a library of books, is real eſtate; but neither freehold nor chattel, though the books themſelves are perſonal chattels.

real and perſonal; in our ſenſe of thoſe words. We proceed to the quantities of intereſt in things, known to the Romans.

The higheſt quantity of intereſt which any man can have in property, is the abſolute, uncontrolled, independent, perpetual power over it (2). This might be had by the Roman law, in that ſtate where poſſeſſion was perfectly allodial, though the higheſt eſtate of an Engliſh ſubject can be only in fee ſimple. The nature of an allodial eſtate, that is of one wholly independent, and

A freehold is an eſtate of indeterminate duration in things immoveable of free tenure; it may be in ſome, incorporeal hereditaments, as rents and tithes, not in others, as a right of way.

TENURES.

(2) The Engliſh reader may perhaps be ſurpriſed to find the head of tenures totally omitted in the preceding part, till he is informed that they were utterly unknown to the civil law. They were equally ſtrangers to the Engliſh before the feodal polity was introduced: from that period, it has been a fundamental maxim with us, that the king is the univerſal lord and original proprietor of all the lands in theſe kingdoms, and that no man doth or can poſſeſs any part of them but what is derived from, and *held* under and from him, mediately or immediately, in conſideration of feodal ſervices. But the Roman land owner did not *hold* of any ſuperior; his poſſeſſion was perfectly allodial, and wholly independent. Tenures are the offſpring of feudality, inſomuch that Wright and Woodeſon obſerve, that the introduction of feuds and tenures is ſpoken of as the ſame fact and event.

held of no ſuperior, is ſo ſimple and obvious to every comprehenſion, that it requires no illuſtration. Laborious comments are only neceſſary to the feodal conſtitution, or doctrine of tenure. On quantities of intereſt, therefore, the Roman lawyers have ſaid little or nothing.

Eſtates Tail.—Mr. Gibbon and others have poſitively aſſerted that the civil law was not acquainted with entails (3). I will not aſſert that it was, in the ſhape to which we have been accuſtomed, but it appears to me very certain, that reſtrictions ſimilar to thoſe of entailing were familiar to the Romans, though not attended with all the concomitant ideas annexed by our law to this ſpecies of eſtate. In Dig. 30. 114. 14. A prohibition of alienation by will, without cauſe expreſs, is declared to be invalid. And then it proceeds to ſay, *quod ſi liberis aut poſteris, aut hæredibus, aut aliis quibuſdam perſonis conſulentes, ejuſmodi voluntatem ſignificant, eam ſervandam eſſe*, and mentions an inſtance where a father having a ſon and three grandſons, *fidei commiſit* to the ſon, *ne fundum alienaret, & ut in familia relinqueret.* Nothing can be plainer than this authority, to ſhew that reſtrictions upon alienating away

(3) Mr. Gibbon's words are—The ſimplicity of the civil law, was never clouded by the long and intricate entails which confine the happineſs and freedom of unborn generations. 4th vol. ch. 44. p. 328. oct. ed.

from a family were valid. I agree with Mr. Gibbon, that this could not be done by *direct* entail, becauſe the Roman heir or deviſee (as ſhall be explained more fully hereafter, under titles by deſcent and by will) acquired and abſolute dominion over the inheritance, without any poſſibility of faſtening upon him *directly* any tack or appendage, in the way either of entail or of remainder; but I cannot agree with that celebrated writer, that this might not be done by way of truſt. Under the name of *fidei commiſſary ſubſtitutions*, ſays Wood (4), and rightly in my opinion, were comprehended not only truſts, but entails and remainders. The method was this; though no ſuch ſhackle could be put, as we have ſaid, *directly* on the heir, yet the eſtate could be left to him upon truſt, that he would at his death leave it to another, and ſo on, by way of what was called *ſubſtitution*, and the perſon thus ſubſtituted correſponded to the iſſue in tail or remainderman with us; this being done, however, merely under the principle that each poſſeſſor for the time being held only in truſt to hand over, by ſome direction of his, when his time of enjoyment ſhould be at an end, the eſtate to the next entitled, therefore theſe limitations of eſtate were not called by any term ſynonimous to entails or

(4) In a note, p. 140. 8vo. ed.

remainders, but comprehended under the general head of *fidei commiſſa*, or truſts (5).

(5) TRUSTS.

Truſts were firſt introduced at Rome, in the time of Auguſtus, for the ſake of thoſe that could not have been deviſees or donees, according to ſtrictneſs of law, as for example, aliens. The eſtate therefore was conveyed to a citizen, who was the direct heir, the fiduciarius or truſtee, on truſt to deliver over the inheritance to the *fidei commiſſarius*, or ceſtui qui truſt, or to let him receive the profits, and as the execution of theſe directions, depending on the honeſty of the truſtee, was not ſufficiently enforced at firſt, a prætor was appointed expreſsly for the purpoſe of forcing the truſtees to fulfil the truſts.

Mr. Gibbon inſiſts, that the doctrine of truſts went no further at Rome, than the ſimple form above mentioned, and that ſuch *fidei commiſſary ſubſtitutions* as are relied upon in the text to prove the Romans had what may be called truſt entails, are of modern invention, feudal ideas grafted on the Roman juriſprudence, and derived from an abuſe of the 159th Novel. which he calls a partial perplexed declamatory law. It is well known that Trebonian was accuſed of corruption with regard to the enacting of that law, (which took the deciſion of a family diſpute out of the ordinary courts of juſtice), and that he is ſuppoſed therefore to have enveloped it in ſtudied obſcurity. But ſtill enough, in my opinion, appears in that law to ſhew, that *fidei commiſſary ſubſtitutions* were then, and long before, uſual. The caſe was briefly this; A. had left an eſtate by will, with a prohibition of alienation out of the family, after four deſcents; a part of it was alienated: the ſon of that deſcendant inſiſted on the will. The law decides, that in that

Eſtates for life.—Eſtates for life are divided by Judge Blackſtone into thoſe created by act of the parties, and thoſe created by conſtruction, or operation of law. Of the latter kind I do not find any among the Romans. T. in tail after poſſibility, is a creature of our own law; and tenant by the curteſy adds to his definition the words *of England.* With tenancy in dower, Blackſtone has himſelf obſerved, the civil law was unacquainted. In it therefore we ſhall only find mention of *conventional* eſtates, or leaſes for life; and and on theſe it has ſaid very little, becauſe, though the Romans had ſuch terms, they were not uſual, their lands in general being ſet only for very ſhort terms of years.

Eſtates for years.—The terms for years among the Romans were then, as we have obſerved, extremely ſhort, like the modern tenures in France and Switzerland (6). No term is more frequently

particular caſe, the teſtator's meaning was not to entail the prohibition of alienation beyond his own children, *i. e.* the firſt degree; but that at all events, and in all caſes, it could not be extended beyond the fourth degree.

(6) In France, ſays Gibbon, all leaſes of land were determined in nine years, until this limitation was removed ſo lately as the year 1775; and adds, that he is ſorry to obſerve that it ſtill prevailed in the beauteous and happy country where he then reſided, in Switzerland. Gibbon's Decline and Fall, &c. chap. 44. in a note. Leaſes in China are not uſually longer than ſeven years. Lord Macartney's Embaſſy, vol. 2. p. 505. The reader will obſerve, that

mentioned than the quinquennium, or term for five years, inſomuch as to induce ſome perſons to imagine that the power of leaſing was reſtricted to that period by law, though Mr. Gibbon rightly ſuppoſes it was only by cuſtom (7). To eſtates for years, therefore, their moſt uſual mode of leaſing, I ſhall confine a ſhort account of ſuch incidents to leaſes, as I have been able to glean

though I have, (in Mr. Blackſtone's method, and to conform as much as poſſible to the genius of the Engliſh law), conſidered leaſing and hiring of land ſeparately and detached from other hiring; yet the civil law conſiders all hiring, whether of lands, houſes, animals, or other moveables, or even of perſonal labour, all together under the claſs of contracts, and under the one head of locatio, hiring or letting to hire.

(7) From theſe obſervations of the ſhortneſs of their leaſes, muſt be excepted their emphyteuſes or fee-farm leaſes. They originated in the ſame cauſe which produced our leaſes ſo common in Ireland for lives renewable for ever, in the barrenneſs of certain lands, which on that account no perſon would take or improve on a ſhort leaſe; indeed the emphyteuſis of the civil law is expreſsly held by celebrated writers to have been the parent of the Engliſh fee-farm, and by ſome even of our copyhold eſtates; and I apprehend the Romans actually had leaſes for lives renewable for ever. The emphyteuta was ſo called from being obliged to plant and improve the land; he could mortgage and alienate, but if he ſold, the landlord had the firſt option as a purchaſer, which was called *Jus Protomeſios*. If he aſſigned, he paid a relief, which was called *Laudimium*. See Cod. 4. tit. b. 8. ch. 3.

from the diſperſed and extenſive fields of the civil law (8). Their law of emblements was very ſimilar to ours, and founded on a like principle of ſound reaſon, that where a man knows the expiration of his time, it is folly for him to act as if he did not. This I think appears clearly from Dig. 19. 2, 9. where the caſe is put of a leaſe for five years, provided A. ſo long lived, expiring upon the death of A. and it is declared that if the leſſee had done acts *quaſi quinquennio fruiturus,* he muſt ſuffer for it, becauſe *hoc evenire poſſe proſpicere debuit.*

Mr. Gibbon has repreſented the intereſt of the leſſee or colonus, as miſerable and precarious, and ſo it was in many reſpects, but not quite ſo inſignificant or trifling as he repreſents it. He

(8) If this account appear ſuperficial to the Engliſh lawyer, it is becauſe he is not acquainted with the difficulty of deriving from books *alone* at the diſtance of one thouſand and two hundred years, any thing like a complete ſyſtem, where he is to expect aid only from detached fragments, hints, and alluſions to practices and uſages perfectly known at the time, and therefore imperfectly explained; and where he perhaps does not find a ſubject treated of under one diſtinct appropriate head, but diſperſed up and down under a thouſand, often apparently foreign to it.

On the particular ſubject of their leaſes for years, we muſt alſo obſerve, that another difficulty in obtaining information ariſes from their being as little reſpected, noticed, or mentioned among them, as ſuch tenures were among us before the reign of Edward I.

ſays, no ſolid or coſtly improvements could be expected from a farmer, who at each moment might be ejected by the ſale of the eſtate. Now true it is, that if the leaſe did not mention aſſigns, the purchaſer was not bound by the leaſe (9), but then the leſſee could come upon him for the loſs he ſuffered by the breaking of the leaſe, and the vendee had his remedy over againſt the vendor. And as to improvements, he was not under the diſcouragements he would be with us, for he had a right to be reimburſed for all *reaſonable* improvements.

If we add to this, that the landlord was bound to repair, and was in general obliged to advance the ſtock and improvements of huſbandry (10),

(9) It muſt be remembered, that in the early periods of our hiſtory, a landlord could at will extinguiſh all leaſes for years upon his grounds, by ſuffering a common recovery.

(10) Theſe proviſions, ſo apparently reaſonable, and ſo neceſſarily ariſing from the ſhort tenures of the Romans, afford other points of compariſon between the Engliſh and Roman laws. One great uſe of the ſtudy of other laws is, to ſee whether any, and what changes would be adviſeable to be introduced from them into our laws. It is true, that it would be ridiculous to ſuffer every mad experimentaliſt, or expenſive improver, to load a farm with charges which the landlord might never be able to redeem, or to break his contract at pleaſure. But how irkſome is it to a tenant to ſee another derive all the benefit from the value he has added to the eſtate, and how often do we ſee a leſſee in vain praying to be diſcharged from a bargain become intolerable by unforeſeen events?

and that the leſſee could relinquiſh his bargain if he found it diſadvantageous; the ſituation of the leſſee for years, was by no means as bad as it was originally in theſe countries.

The 19th book of the Pandects, title 2d, and the 4th book of the Code, tit. 65, contain the uſual implied legal engagements between leſſor and leſſee; from its peruſal we learn that the leſſee was to uſe the land carefully, and as a good owner ſhould, and to pay the rent, and ſurrender the premiſes uninjured, at the end of the term: he might let to others, but was anſwerable for the acts of his under-tenants, as he was for thoſe of his ſervants. He was not bound to repair, except by ſpecial covenant or by cuſtom (11). He was

(11) In Ireland, a covenant binding leſſee to repair, is almoſt univerſal in leaſes. In England, a landlord repairs where there is no leaſe, and very often chuſes to do ſo when there is, from regard to the neatneſs of his eſtate. Though there be no particular covenant to repair, yet leſſee for years is anſwerable for waſte in general; and to let the houſe fall down would be waſte. 2 Bl. Com. ch. 18. 1 Ves. 462. Leſſee who covenants to pay rent, and to repair (accidents by fire excepted), though the premiſes are burnt, and not rebuilt by the leſſee after notice, continues liable to the payment of the rent. 1 T. R. 310. The civil law would have determined to the contrary. T. for life without impeachment of waſte, ſhall not be allowed to commit *deſtruction*, as by wantonly cutting down ornamental trees out of enmity, perhaps, to him in remainder, 2 Vern. 738. 1 Brown, 166. 3 Bro. 549.

obliged to quit a houſe leaſed if the landlord really wanted it for his own habitation, and was bound to a temporary relinquiſhment of his holdings, if the landlord wanted the poſſeſſion for the purpoſe of repairs. If he made improvements or repairs, he was to be reimburſed. If evicted by a ſtranger, or if the poſſeſſion was diſturbed by the landlord himſelf, rent was extinguiſhed or ſuſpended, and leſſor liable to make good all the damages which the farmer ſuſtained, and all the profits he might have made. The T. was diſcharged from rent, if by any extraordinary event ariſing from tempeſts, or from an enemy, he was prevented from enjoying and reaping the crops. But if the accident was of an ordinary nature, or the damage received in the common courſe of things, as from pernicious weeds in corn, or from the too great age of worn-out vineyards, which are the inſtances put in ſec. 15. lib. 2. 19 Dig. the leſſee was not diſcharged from paying his rent: ſo if the damage, though done by a voluntary treſpaſſer, was ſlight. If landlord had remitted the year's rent to his ſuffering tenant, and that tenant, by the unuſual fertility of the ſucceeding year, had amply compenſated the loſs of the former, the remiſſion was done away, and the tenant became again ſubject to the rent: it ſcarcely need be ſaid that all theſe regulations might be altered and modified by ſpecial covenants, which might render the tenant liable to all loſſes, and expoſed to all chances of events.

The emphyteuſes, which were leaſes for ever, or for long terms of years, differing entirely in their nature from the ſhort five years leaſes to which our obſervations have been hitherto applied, the principles applied to them were totally different; the emphyteuta was bound to improve, he therefore got no abatements, as the conductor (which was the name for the ordinary leſſee for ſhort terms) did for extraordinary calamities. But in return he had the extraordinary privilege of relinquiſhing his bargain, if he found it diſadvantageous.

He too might mortgage and alienate, which the conductor or uſufructuary could not: in fact, the conductor was not conſidered as having any property in the land, but merely as having a title to the enjoyment of the fruits and profits, whereas the perpetual tenant was conſidered as having the *utile* dominium, while the *direct* property remained in the landlord: and hence, in the Roman law, the perpetual tenant is conſidered in a double capacity, either as or as not being the maſter of the eſtate, according to the different lights in which he and the property are viewed (12).

(12) I have inſenſibly fallen here into the uſe of the terms landlord and tenant, as Domat and others have done, though the Romans, not having the doctrine of tenures, leſſor and leſſee are the more proper terms.

T. at will and by ſufferance. The Roman law reſembled ours, in ſtriving as much as poſſible to conſtrue tenancy at will to be holding from year to year. In the ſame manner, if the tenant held over after the term expired, and the landlord did not immediately take legal ſteps to remove him, or ſeemed in any manner to acquieſce, his ſilence was conſtrued to be a tacit renewal of the leaſe—and the leſſee could not be turned out without regular notice; he became tenant from year to year, or ſometimes for two years certain; for inſtance, if there was an inequality in the produce, which made every ſecond year more valuable, his leaſe was tacitly renewed for two years (13); and under ſome ſpecial circumſtances he might thus tacitly become entitled to a term as long as his

(13) Our law nearly agrees in all theſe particulars. See 3 Burr. 109. Eſpinaſſe, 469. Upon the whole, however, it muſt be acknowledged, that the Roman leſſees ſeem much to have reſembled the Metayers in France, to whom the landlords furniſhed the ſeed and implements of huſbandry, and ſhared in the profits; which, ſays Mr. Young, in his tour through France, promiſes well, but ſucceeds ill. Lord Kaimes * obſerves, that it is believed to be the univerſal opinion, that without a long leaſe, it is vain to hope for an improving tenant; and though confidence may ſupply the want of long terms, yet, ſays Adam Smith, in his Wealth of Nations †, perhaps England is the only country under Heaven, where a tenant will improve, and even build, without any leaſe whatſoever.

* Gentleman Farmer, p. 407. † 2 Vol. book 3. p. 174.

former one. Though, on the contrary, this tacit renewal might be for leſs time than a year, from the nature of the ſubject, e. g. of a wine preſs to the time of vintage. Such an implied renewal revived all the conditions in the former leaſe—it was a continuance of the firſt leaſe with all its conſequences.

CHAPTER IV.

OF ESTATES UPON CONDITION.

OF theſe the principal and moſt remarkable being mortgages, I ſhall chiefly confine myſelf to them, previouſly remarking only, that in every law the ſcholar muſt naturally expect to find mention of conditions expreſs and implied, precedent and ſubſequent, and of eſtates dependent upon them accordingly. They ariſe neceſſarily from the nature of things, and the commerce of men; but the civil law not having adopted certain ſubtle diſtinctions, which in ours make the *particular* conſideration of ſuch eſtates incumbent upon us (ſuch for inſtance as between a condition in deed and a limitation) does not dwell with any peculiar attention upon ſuch conditional eſtates, ſave upon mortgages, though it is by no means ſilent as to conditions in the abſtract (1).

Mortgages were ſo well known to the civil law, that many allege, as Mr. Fonblanque has ob-

(1) It views them under the head of covenants, which will come under our conſideration in the third book.

ſerved, that our own doctrines upon the ſubject are borrowed from that comprehenſive code. Without determining that queſtion, we ſhall find many things relative to them in its regulations worthy of obſervation.

The pignus & hypotheca of the civil law are ſaid, Dig. 20. 1. 5. 1. to differ only in name, yet in other places, and as Wood ſays, in propriety of ſpeech, the pignus is of things moveable, the hypotheca of things immoveable, like the uſual diſtinction of a pawn and a mortgage with us. Yet Blackſtone, Com. vol. 2. p. 159. (2) and Mr. Powel, in his Treatiſe on Mortgages, make the diſtinction be, that when actual poſſeſſion paſſed to the creditor, it was a pignus; when the poſſeſſion remained with the debtor, it was hypotheca, analogous to our diſcrimination between the mortgagee in and out of poſſeſſion, in which they are ſupported by Dig. 50. 16. 238. 2. and Inſ. 4. 6. 7. (3). Mortgages were divided into

(2) Mr. Powel gives his opinion, that mortgaging (though by ſome thought to have originated with the Jews) *as practiſed with us, ſeems to owe its introduction more immediately to the civil law*, which diſtinguiſhed between pledges and things hypothecated. Mr. Butler ſeems to differ, and ſays, they were rather introduced on our common law doctrine of conditions, an obſervation which Mr. Fonblanque truly ſays, at leaſt cannot apply to the equity of redemption.

(3) The former authority however adds, quidam putant pignus proprie rei mobilis conſtitui; and the latter ſays, pignoris appellatione eam proprie rem contineri dicimus quæ ſimul etiam traditur creditori, maxime ſi mobilis ſit.

conventional, prætorian, and judicial (4); but the firſt only correſpond to our mortgages, and therefore are alone here conſidered; the two latter mean what we call executions, or would term liens upon an eſtate; they were called alſo tacit pledges.

It was not neceſſary that the mortgage ſhould be in writing, and as this naturally left an open for frauds, by ſecretly remortgaging the ſame thing, three witneſſes latterly were required, and if the debtor had not ſufficient to pay the ſecond debt, the creditor might proſecute him for the crime of ſtellionate or fraud, becauſe he did not give him notice of the precedent mortgage. Dig. 13. 7. 36. 1.

By the civil law, ſays Mr. Fonblanque, the mortgage was properly a ſecurity only for the debt itſelf, for which it was given, and the conſequences of it, as the principal ſum and intereſt with the coſts and damages laid out in preſerving it, and did not involve ſuch effects as that the heir of a mortgagor alſo indebted by bond to the mortgagee, ſhould not redeem without alſo paying the bond debt, and ſuch like proviſions known to our courts of equity (5).

(4) Et ſine ſcriptura ſi convenit ut hypotheca ſit, & probari poterit res obligata erit. Dig. lib. 20. tit. 1. ſec. 4 See C. 8. 18. 11.

(5) He quotes Dig. lib. 13. lib. 7. ſec. 8. I think he is miſtaken, and am ſupported by Code 8. 27. 1. which ſays directly the contrary, ſi in poſſeſſione fueris conſtitutus,

The twentieth book of the Digſts, and the eighth of the Code, furniſh our knowledge of the civil law upon the ſubject of mortgages: all things which might be bought or ſold (which things were ſaid to be in commerce), might be ſubject to a pledge or hppotheque, lands, houſes, moveable goods, debts and actions (6), and other rights, Dig. 20. 19. but tools, and implements of huſbandry, could not be hypothecated, Code 18. 17. 8. and the dotal farm of a wife could not be mortgaged, even with her conſent.

The mortgagee might have, by agreement, the profits of the property pledged, for the intereſt of his money, which was called pactum antichreſeos; but the mortgagor, though he might covenant, that on failure of payment the property ſhould be ſold, yet was not by law allowed to covenant, that it ſhould be abſolutely forfeited to the creditor, who might otherwiſe, taking advantage of his neceſſities, get poſſeſſion of a large property mortgaged for a ſmall debt. See Dig. 20. 1. 11. 1. and Code 8. 35. 3.

The mortgagor might indeed covenant that his creditor, on failure of payment, ſhould have the thing mortgaged at a fair valuation, repaying the

niſi ea quoque pecunia tibi a debitore offeratur vel reddatur, quæ ſine pignore debetur *(quam mutuam ſimplicitur accepit)* reſtituere non cogeris, &c. &c. Nor does the Digeſt quoted by him ſay it ſhall be ſecurity for *nothing more.*

(6) Our law differs as to debts, actions, or choſes in action; they cannot by ours be transferred.

difference, if the value exceeded the debt, and the mortgagee could not be legally bound by any agreement not to ſell at all.

The law therefore conſidered three caſes, and provided accordingly: 1. Where a power of ſale had been included in the original mortgage. 2. Where it had been expreſsly excluded. 3. Where there was nothing mentioned upon the ſubject. In the firſt caſe, no notice was neceſſary to the creditor before the ſale; in the ſecond, the thing might be ſold, but three notices were to be given, at certain ſtated intervals: in the latter, notice was to be given, and two years muſt have elapſed from the time of that notice, before the ſale could be made (7); but in none of theſe caſes does it appear to have been neceſſary to go into any court, or to apply to any magiſtrate to authorize the ſale, which was done by the private authority of the creditor, and the implied conſent of the debtor (8). All theſe caſes

(7) Mr. Fonblanque ſays, no rule appears to have prevailed in the civil law reſtrictive of the time of redemption; he muſt mean no ſuch rule as is adopted by our courts of equity, of length of time being pleadable in bar of redemption, but he does not mean that he could not be foreclоſed in the manner in text.

(8) Mr. Powel ſays, that the pignoratitious action was againſt the perſon of the debtor, to foreclоſe him, when the pledge was already in the poſſeſſion of the creditor. Mr. Powel is certainly miſtaken in thinking, that any ſuch action was neceſſary to enable the creditor to ſell, or that

ſuppoſe a time of payment appointed, but if no time mentioned, the thing might be ſold immediately; here, however, reaſon and a prætorian court would have intervened, and obliged a reaſonable delay. See Dig. 13. 7. 18. and Code 8. 28. 4. and 34. 3. and Inſtit. quibus alienare licet. If the mortgagee had been in poſſeſſion, or in any way recovered his debt out of the rents or profits he could not ſell; if he did, in ſuch caſe the ſale could be reſcinded or not, according as the buyer was or was not conuſant of the fraud.

Pledges or mortgages were alſo divided into general and particular. In a general mortgage of a perſon's whole property, things abſolutely neceſſary for the ſupport of life, did not paſs, Dig. 20. 1. 6. 7. but it extended to all future acquiſitions, even without any expreſs agreement, Code 8. 17. 9. If a particular thing was pawned, ever thing

he had occaſion to apply to a court, nor was the pignoratitious action of that nature at all; it was properly an action given to the debtor againſt the creditor to recover the pledge, the debt being ſatisfied; and though the creditor had a contrary action of the ſame nature, it was for very different purpoſes, as ſhall be ſhewn in the ſequel. In ſome caſes, however, the creditor ſeems to have been obliged to apply to a court of juſtice for power to ſell, when the debtor could not be found, ſo as to be ſerved with proper notices of ſale, Code 8. 34. 3. and it ſhould ſeem as if he might, if he pleaſed, make a voluntary application to a court in any caſe, if he preferred that method to the one by private notice, from the language of Code 8. 34. 3. de jure dominii impetrando.

that was the product, or part of it, if it continued in the ſame ſtate, and was of the ſame nature, was contained in the obligation (9). If poſſeſſion was not given, all the property of the debtor was impliedly pledged to prevent frauds on his part in ſelling the thing mortgaged, Dig. 20. 1. 13. The mortgagee in poſſeſſion was obliged to anſwer not only for groſs, but even light negligence, but not for the lighteſt fault (10). But he was not bound to anſwer for inevitable accidents, unleſs they were occaſioned by his means; he was to account for the profits, and if he had been ſatisfied out of the profits, the mortgage was at an end, and the poſſeſſion might be redemanded. The mortgagor was obliged to allow in account, all neceſſary expences laid out on the premiſes, but whether improvements ſhould be allowed, depended upon circumſtances. In general, thoſe which really increaſed the value of the eſtate were, merely ornamental were not. The firſt money paid the creditor was applied in diſcharge; firſt, of the intereſt, and afterwards of the principal; and in caſe of a ſale, if moveables and immoveables had been pledged, the moveables were to be ſold firſt, and if ſufficient to pay the debt, the immoveables were not to be touched; the only inſtance almoſt of any diſtinction in the civil law reſembling ours, between real and perſonal

(9) See 1 Atk. 477.

(10) As to theſe diſtinctions, ſee Jones on Bailments.

eſtates (11). Special pledges alſo were to be ſold before general ones.

Another diviſion of mortgages or pledges was into expreſs or tacit. Tacit were thoſe intereſts of the exchequer in the goods of the ſubject, as ſecurity for the public taxes—of the landlord in the thing leaſed for his rent—of the pupil in the property of his guardian—of the wife in the goods of her huſband to the amount of her dowry—of the repairer of a houſe in the houſe repaired, with ſome few others of leſs note. It is obſervable, that the caſe of a maſter of a ſhip-contract is not mentioned, though it has been ſaid (12), that every contract of the maſter tacitly binds the ſhip, and argued by analogy from the repairer of a houſe, but Gail denies the analogy.

The mortgagee out of poſſeſſion might, on failure of payment, obtain poſſeſſion by the hypothecarious action: the mortgagor, when poſſeſſion had been delivered might (on the debt being paid or ſatisfied out of the profits) reclaim it by the pignoratitious action; a counter pignoratitious action was given to the creditor where the pledge having remained in debtor's hands, the creditor could not recover it, but ſued for the value; the mortgage was affected by the privileges of certain creditors, as if money was lent to build

(11) See D. 50. 17. 23. 13. 7. 8. and 35. Dig. 42. 1. 15. 2.

(12) 2 Lord Raymond, 805.

or repair a houſe which was afterwards mortgaged to another, the lender had a tacit lien or pledge on the houſe, and was preferred to the expreſs mortgagee; ſo the landlord's claim of rent was preferred, but the claims of the exchequer had no ſuch privilege of being preferred to a mortgage, though they were to a ſimple debt, and the mortgage debt alſo took place of many claims which had privilege of other debts, ſuch as funeral expences, &c. (13) theſe not being conſidered like thoſe above-mentioned to be tacit, but direct liens upon the mortgaged property.

The fourth title of the 20th book of the Pandects, and the 18th of the eighth of the Code, treat of the order and priority of mortgages; the caſes put are many and various, and do not ſeem materially to differ from the proviſions of our own law. A ſubſequent mortgagee could of courſe receive nothing, till a former had been paid his principal, intereſt, and coſts but he might buy off the former, and ſo protect or confirm his own title (14). We have before obſerved, that a mortgagee might tack another incumbrance to his mortgage, and if he lent more money by way of further charge on the eſtate mortgaged, he was preferred as to this charge alſo, before a mortgagee created in the intermediate time (15). Dig.

(13) See Dig. 20. 2. 1. & 11. 7. 45.

(14) See 2 Vent. 337. 2 Vern. 156. 1 Bro. 63.

(15) Compare this with the caſe of Fraine *v.* Cole, in chancery, 1783, cited by Mr. Woodeſon in his Lecture on Mortgages.

20. 4. 3. In ſome caſes the ſubſequent mortgagee was preferred, e. g. if his mortgage had been made for the preſervation of the pledge itſelf, as for the repairs of a ſhip, if that had been the ſecurity (16); in the 16th ſection of the 4th title, 20th book of the Digeſts, a caſe is reported of a third mortgagee, who having defeated the firſt in a ſuit, and proved the weakneſs of his claim, claimed therefore himſelf priority to the ſecond, who had been no party to the ſuit; it does not ſeem very reconcileable with the wiſdom of the civil law, to have ſtated it as a ſerious queſtion, but it ſerves to ſhew that this ſpecies of property ſeems to have been as productive of controverſy with them as among us.

To enter more into detail upon their law of mortgages would be foreign to my preſent plan. I ſhall conclude with obſerving, that the aſſignment of mortgages is frequently mentioned, under the name of ſubrogation or ceſſion, and that a ſecond mortgagee could not ſue without ſatisfying the former (17).

(16) Hypothecation of ſhips is by the civil law.

(17) Mr. Fonblanque, in a note on book 3. ch. 3. of the Treatiſe of Equity, obſerves, that the poſition laid down by Lord Hardwicke, and now undiſputed (viz. that a third incumbrancer, without notice of a ſecond, taking in the firſt, ſhall have ſatisfaction before the ſecond), could not hold in any countries but theſe, becauſe the juriſdiction of law and equity is adminiſtered in different courts, yet I think it held at Rome in the ſame court. I ſhould heſitate long before I controverted the authority of

Mr. Fonblanque, if this be controverting it, for perhaps he ſpeaks of modern Europe only; his reſpectability is deſervedly conſiderable, and every lawyer has experienced the utility of his commentary; but I am ſupported, I think, by Heineccius, in his comment upon the 20th book, 4th part of the Pandects, *Qui potiores in pignore*, where he ſays, hypothecarium poſteriorem priori, ſive volenti ſive invito ſolvere vel offerre pecuniam, poſſe; eo facto jus omne pignoris, *immo ipſum jus prælationis*, in ipſum transferi, &c. The reader muſt be aware, that I could load the work, like Dr. Ayliffe, with an infinity of queſtions in the civil law between mortgagor and mortgagee, or the aſſignees of each, as well as between two mortgagees, where firſt brought by the latter to an account, if I thought they could afford either amuſement or inſtruction to the modern lawyer. The civil law of mortgages is much referred to in Ryall v. Rowles. 2 Veſey, p. 169.

CHAPTER V.

OF ESTATES IN JOINT TENANCY, COPARCENARY, AND COMMON.

OF REMAINDERS AND REVERSIONS.

UPON the ſubjects of this chapter I ſhall have occaſion to ſay very little, for a reaſon very well and briefly expreſſed by Mr. Woodeſon, when he is ſpeaking of the refined ſpeculations of the civilians upon the nature of contracts, which is, that the thoughts of the Roman juriſts were not immerſed and entangled like thoſe of the early lawyers of this country, in metaphyſical and abſtruſe ſubtilties, applied to landed eſtates. We ſhall find therefore among them, none of the metaphyſical diſtinctions between the ſeiſin of joint tenants and tenants in common, nor any elaborate niceties about veſted and contingent remainders. Joint eſtates of neceſſity they had: as all property gavelled, the takers by deſcent, of courſe, were coparceners. Of tenancy in common, little mention is made (probably becauſe

they conſidered it too plain a ſubject to require illuſtration) enough however to ſhew us, that it was favoured with them, even more than with us; for, ſtrictly ſpeaking, joint tenancy could not, by the civil law, be created by deed or inter vivos at all, but only by will.

The points to which they have chiefly attended, are the jus accreſcendi and the right of partition; the jus accreſcendi, is the very ſame term which is applied to the right of ſurvivorſhip by our ancient lawyers (1). This jus accreſcendi had place between coheirs, and between joint deviſees or legatees, but not in ſervices, nor among merchants, nor in donations or grants inter vivos, except they flowed from the emperor, nor in ſubſtitutions in truſt, but in direct ſubſtitutions it had (2).

(1) See 2 Black. Com. p. 193. and Mr. Chriſtian's note thereon.

(2) See Code 10. 14. Dig. 32. 3. 89. Code 4. 37. 3. Though there was jus accreſcendi between legatees, this only means where one died before teſtator, or would not accept his part, for if both outlived him there was no ſurvivorſhip between legatees, and the ſame is our eccleſiaſtical law. See Swinburne, part 1. ſec. 7. and 2 Lev. 209. our law agrees as to merchants.

A. makes two executors, B. and C. appointing them reſiduary legatees—B. dies, the whole ſhall ſurvive to C. Cray *v.* Willis, 2 P. Williams, p. 529.

The action communi dividundo lay by one joint tenant, or T. in common againſt another, to oblige him to divide the joint property, which was called rei communio. But if the holders of the joint eſtate were coparceners, or coheirs, their remedial action in this caſe was called familiæ erciſcundæ. See 3 Inſt. tit. 28. If a thing could not conveniently be divided, the whole might be adjudged to one, he paying the other the value of his part; or if matters could not otherwiſe be ſettled, the whole muſt be expoſed to ſale. Code 8. 37. 1. and D. 8. 4. 5.

If the united property was in unequal ſhares, the greater ſhare might be charged with a ſervice to the other, D. 2. 10. 22. 3. and every ſhare ſtood as a warrantry to the title of the others. C. 3. 36. 14.

The title deeds of an eſtate in common, might be ordered by the judge to be left with him that had the beſt part, and that the others ſhould have authentic copies, or if all had equal intereſt, the judge might nominate a perſon to keep them ſafely in his cuſtody. Dig. 10. 2. 5.

REMAINDERS AND REVERSIONS.

In ſtrictneſs, or by any direct mode undoubtedly, as we have repeatedly obſerved, there could be no ſuch thing either as entails or remain-

ders (3). Nor did the uſual ſubſtitutions ſignify any thing ſimilar, they were vulgar or pupillary, the vulgar ſubſtitution ſignifying the appointment of a ſubſtitute in caſe the heir at law, or original deviſee, would not accept the heirſhip; the other providing, that in caſe a minor ſon would not accept the heirſhip, or having done ſo, ſhould die under age, the appointee of the father ſhould come in his place; to which may be added, the quaſi pupillary, differing from the laſt only in its object, being an ideot or lunatic, whether minor or not. But I am ſupported by Mr. Wood and the French

(3) In thinking that they could even indirectly, I have to combat not only Mr. Gibbon, but Dr. Adam Smith, who, on the Wealth of Nations, book 2. ch. 3. p. 166. treats with contempt theſe fictions, as he ſuppoſes them, of the French lawyers; he ſays, neither fidei commiſſa, nor ſubſtitutions, reſembled entails. Dr. Halifax is at iſſue with him, for he ſays they did.

I think I have conceded too much to my reſpect for Mr. Smith and Mr. Gibbon, by granting in the text that pupillary ſubſtitutions did not reſemble remainders; in ſome inſtances ſurely they did; what is a deviſe to a ſon, and if he die under age to a ſtranger, but a contingent remainder as to the latter? and did not the famous caſe of Curius and Coponius, argued by no leſs men than Scævola and Craſſus (which Lord Mansfield has peculiarly noticed) reſpect a remainder: That was a deviſe to a child with which the wife was ſuppoſed to be pregnant, and if ſuch child died under age, then a deviſe over. Cic. de Oratore, lib. 1. Burr. 1623.

juriſts, in thinking that fidei commiſſary ſubſtitutions, often correſponded to our remainders, and what I conſider much more than either, I think I am ſupported by paſſages in the Code. The Pandects, lib. 28. tit. 6. ſec. 23. ſpeak of croſs remainders, qui plures hæredes inſtituit ita ſcripſit, *eoſque omnes invicem ſubſtituo*; but what I chiefly rely upon is, the 6th book and 42d title of the Code; there, among other things, this caſe is put, ſi frater tuus poſtquam patri hæres extitit, pubes jam factus deceſſit, ex pupillari ſubſtitutione tibi hæreditas ejus delata non eſt. Sed ſi verbis fidei commiſſi aliqua parte teſtamenti confirmata eſt, fidei commiſſum ab hæredibus petere non prohiberis.

Now ſince, as Mr. Gibbon ſays, the power of the teſtator expired with the exiſtence of the teſtament, and the heir who accepted acquired an abſolute dominion over the property, how in this caſe could the brother have ſucceeded but as a remainder man, by virtue of the truſt created by the father's will?

Reverſions, literally ſpeaking, the Romans muſt have had, but not in our feodal ſenſe of them, nor with their feodal conſequences, ſuch as the incidental rights of the reverſioner reſpecting rents, and the peculiar modes of the deſcent of reverſions, which introduce them with us to the particular notice of legal writers.

We have now deſcribed the nature and diviſions

of things, and the ſeveral kinds of eſtate or intereſt that might be had in them. We ſhall proceed in the enſuing chapter to conſider the titles to things; not firſt to things real, then perſonal, as Sir William Blackſtone has been forced to do by the genius of our law, but according to the mode of the civil, to both together—to things in general.

CHAPTER VI.

LAW OF DESCENTS.

THE Roman law of deſcents is worthy of our attention, as our rules reſpecting the devolution of perſonal property have been in a great meaſure borrowed from it, and as it has been frequently recurred to in our municipal courts, in controverſies reſpecting diſtribution and adminiſtration (1).

(1) That the ſtatute of diſtributions has been copied from the civil law ſome have denied; but Lord Hardwicke, in the caſe of Wallis and Hodſon, 2 Atk. 115, expreſsly ſays, what the maſter of the rolls (Prec. in Chancery, 594.) had ſaid before, that the ſtatute of diſtributions is to be conſtrued by the rules of the civil law. Upon this ſubject then no one will deny, that a knowledge of the civil law is uſeful and neceſſary.

[1] That this celebrated ſtatute was prepared by a very eminent civilian, Sir Walter Walker, every one knows; but Sir Wm. Blackſtone has chilled a little our ſpirit of enquiry, by coldly ſaying, that it bears ſome reſemblance to the Ro-

But before this law can be perfectly underſtood, it will be neceſſary to explain (what has been frequently before alluded to) the nature of the Roman heir or heirſhip. The meaning of an heir, in the civil law, was very different from the ſignification of the word in ours; they applied the name both to him who took by deſcent, and to him who took by will, and to the heirſhip by deſcent, annexed ideas utterly unknown to our law. Their ſingular conception of an heir was this, that he was one and the ſame *perſon* with the deceaſed; that he repreſented him *perſonally;* and his repreſenting him, with reſpect to ſubjects of property, did not more or leſs enter into the Roman notion and definition of an heir: the ſucceſſion was conſidered not as a right of ſucceeding to *property*, but of ſucceeding to the perſon deceaſed, of coming in his place and repreſenting him. The perſon own-

man law of ſucceſſions, ab inteſtato; however, as he ſubſequently acknowledges, that the doctrine and limits of repreſentation laid down in the ſtatute of diſtributions, ſeem to be chiefly borrowed from the civil law, we have no occaſion to be diſcouraged in the purſuit, and may perhaps impute this ſeeming reluctance to admit the received opinion, to an anxiety to do honour to the ancient Engliſh law. See Black. Com. vol. ii. ch. 32. The reluctance of that learned judge to admit our debts to the civil law frequently appears, they are no where more manifeſt than in the donatio mortis cauſa. Yet even as to that he only ſays, that it *ſeems* to be borrowed from the civil lawyers, and he ſhews the ſame jealouſy as to the collatio bonorum.

ing the eſtate was like a corporation that never dies; he was ſuppoſed to be one and the ſame; and this extraordinary idea of an heir is ingrafted into the Scotch law, and is the parent of many conſequences therein. This may be illuſtrated by conſulting Lord Kaimes's Law Tracts, a work much ſuperior to his Principles of Equity (2).

Dr. Chriſtian, in a note on the ſecond volume of Blackſtone's Commentaries, very well and briefly explains the Roman heirſhip: the civil law, ſays he, conſiders father and ſon as one perſon, ſo that upon the death of either, the inheritance does not ſo properly deſcend as continue in the hands of the ſurvivor.

From this principle many curious corollaries followed. We have already mentioned, that the anceſtor could not directly entail the eſtate or name a remainder man, though he might by the circuitous method of binding the heir in ſhape of a truſt; this followed from what has been ſaid, for the inheritance being entirely the heir's, and perfectly in his diſpoſal, any future heir now named by him, took place of any other heir formerly

(2) With a view to theſe principles, it is ſaid, 2 Veſey, 91, an executor was an heir by the old Roman law; but this I think leads to error, for an executor may be without any beneficial intereſt—a mere manager of the property, and truſtee for others, an idea unknown to the Romans till introduced by the eccleſiaſtics, ſometimes for charitable—ſometimes for intereſted purpoſes—in late times of the empire.

named by the anceſtor, and the power of the anceſtor over the property neceſſarily ceaſed with his life, and could not be exerted or extended beyond it.

From the ſame principles followed the celebrated rule of the civil law, "Nemo mori poteſt ex parte teſtatus, ex parte inteſtatus," that a man could not die partly teſtate, partly inteſtate, becauſe his repreſentative, from their legal identity, muſt have all his property; and that the hæres factus, or deviſee, was not conſidered ſo much as taking by purchaſe as by deſcent, not as deviſee but as *heir*, not indeed natural, but appointed, yet ſtill an heir.

Hence alſo aroſe a grand diſtinction between their law and ours as to payment of debts; the creditors of the deceaſed could come upon his heir, not only to the extent of the aſſets he had by deſcent, but alſo upon all the property he had in the world, howſoever or from whomſoever he might have acquired it. As this might often be a great hardſhip, no man was obliged to take by deſcent as with us, and even a ſon might refuſe to be heir, or he might take a year to deliberate whether he would or not. But in later times, things were put more on a footing of good ſenſe, the heir might make an inventory of the deceaſed's effects, and by ſeparating them from his own, ſcreen his other property from debts to which he was a ſtranger (3). If no perſon would take the

(3) This whole ſyſtem, both in principle and practice, long prevailed in Scotland. See Lord Kaimes's Law Tracts.

heirſhip, the owner of property might oblige his ſlave to be his heir, which was often done in expectation of dying deeply in debt, from a whimſical idea of avoiding diſgrace, ſince the goods then ſeized by the creditors would be thoſe, not of the extinct maſter, but of the ſlave, whoſe diſhonour upon this occaſion was always compenſated by the donation of freedom; heirs therefore were *either neceſſarii*, as the ſlave juſt mentioned, or *ſui et neceſſarii*, as the ſons of deceaſed (the latter epithet being added, becauſe they could not be excuſed without application to the prætor), or *extranei*, ſtrangers, who were at perfect liberty to act or not, as they thought fit (4). Having thus explained the heirſhip of the civil law, and having obſerved that the Roman law of deſcent is ſo far intereſting to us, as it gave riſe to our law of ſucceſſion to perſonal eſtates and order of granting adminiſtration, and furniſhed hints for our ſtatute of diſtributions (5), it ſeems ſuperfluous

For the Roman law of heirſhip, ſee Inſtitutes de Succeſſionibus ab Inteſtato.

(4) Monſters could not be heirs by the civil law, nor baſtards, to the father's inheritance, but they might to the mother's; indeed, if the father had no lawful wife or child, the baſtard with his mother ſucceeded to one-twelfth each. Nov. 89. ch. 8 and 12. Cod. 6. 59. 5. Fiſ. 1. 5. 14.

(5) Dr. Chriſtian obſerves, that though it is ſaid that the canon law computation has been adopted by the law of England, yet he does not know a ſingle inſtance in which we have occaſion to refer to it; but that the civil law com-

to go further in delineating the civilians' canons and rules of deſcent, than their ultimate eſtabliſhment and ordination by Juſtinian (becauſe their ſituation at that period alone has been regarded by our laws), without reviewing thoſe perplexed and intricate changes which they paſſed through antecedently to his reign. I ſhall, however, ſubſequently point out ſome of the principal of theſe to the reader's attention.

The canons of deſcent or ſucceſſion adopted by the civil law differ from thoſe of our common law, as to real eſtates, in almoſt every particular, as will appear by the following compariſon.

Firſt, All property (whether what we call real or perſonal) gavelled and deſcended equally among all the children of the deceaſed, both male and female, without regard to primogeniture or ſex, with repreſentation ad infinitum. Nov. 118. ch. 1. and Nov. 22. ch. 29. See alſo Wood.

Secondly, The right of inheritance could aſcend as well as deſcend; the rule was defended by the obligations of the child to the parent, as well as by the ſuppoſition of the eſtate having often proceeded from his bounty: better reaſoning at leaſt than Lord Coke's in ſupport of the contrary doctrine, viz. that *gravia deorſum tendunt.*

putation is of great importance in aſcertaining who are entitled to adminiſtration, and to the diſtributive ſhares of an inteſtate's perſonal property. Note on 2 Black. Com. ch. 14. p. 208.

Thirdly, Whereas real eſtates with us always go per ſtirpes; at Rome, all property whatſoever deſcended, ſometimes per ſtirpes, ſometimes per capita: in the direct deſcending line always per ſtirpes; and ſo among collaterals taking by way of repreſentation, where any perſon (6) of equal degree with the perſon repreſented ſtill ſubſiſted; but if all took in their own rights, they took per capita.

Fourthly, In their method of computing degrees, they reckoned not as we do from the common ſtock downwards, to each of the perſons related, or to the moſt remote of them, but from the perſon *a quo* upward to the common ſtock, and then downward again to the other party related; a diſtinction between their law and ours familiar to every lawyer (7).

Fifthly, No ſuch rule as that on failure of lineal deſcendants, the inheritance ſhall deſcend to the blood of the firſt purchaſer, nor any conſideration had, whether the eſtate firſt came by father or mother's ſide.

(6) Nov. 110. c. 3. Inſt. 3. 1. 6. A brother and two nephews of deceaſed took per ſtirpes; but if no brother alive, the children of brothers would take per capita. See Walſh and Walſh, Prec. in Chan. 54. and 2 Bl. Com. 217. octavo, and Davers *v.* Dewes, 3 P. Wms.

(7) Thus, by our law, firſt couſins are in the ſecond degree, by the civil law in the fourth, viz. to the father one degree, to the grandfather two, to the uncle three, to his child a couſin four.

Sixthly, The half blood was not excluded, though poſtponed to the whole, as we ſhall ſee hereafter.

Seventhly, The agnati, or relations by the father's ſide (8), were not preferred to the cognati, or relations by the mother, though they had been ſo until the diſtinction was aboliſhed by Juſtinian himſelf, and rightly, ſays Sir Wm. Blackſtone, becauſe as the Roman law gave no preference to males in lineal ſucceſſion, there was no reaſon for preferring them in collateral (9).

(8) I bow to Blackſtone, Ellis, and Wood, in interpreting agnati to mean relations by the father's ſide, yet I think that was not always the meaning. Heineccius interprets them to be per virilis ſexus perſonas conjuncti; Gibbon calls them perſons connected by a line of males. According to theſe diſtinctions, I ſhould ſuppoſe that the ſon of a father's aunt ſhould be a cognate, not an agnate; and in the ſecond of the Inſtitutes, the ſon of a ſiſter is ſpecially tranſferred from the cognates to the agnates.

The cognates were preferred to the Gentiles: by the Gentiles were meant thoſe of the ſame general family united by one common name, *a gens like a tribe or clan*; the nomen marked the gens; the cognomen or ſurname the particular branch of that family. Caius Julius Cæſar was of the Julian family, and of that branch of it called Cæſars; the Julii were gentiles to him, the Cæſars agnates. To Publius Cornelius Scipio, Publius was the prænomen correſponding to our chriſtian name, Cornelius the name, Scipio the ſurname, i. e. he was of the Scipio branch of the Cornelian family: ſometimes an agnomen was added, as to him Africanus. The wife took the huſband's name as with us.

(9) Sir William ſeems to forget that, in collateral, the relations by the female line would even at Rome carry their

Having thus ſhewn how very different their canons of deſcent were from ours, I proceed to ſketch the method in which they ſearched for the heir of an inteſtate, or the ſucceſſor to his eſtate.

1. In the firſt place ſucceeded all his children, by equal portions, with repreſentation ad infinitum, without any reſpect to primogeniture or preference with regard to ſex.

2. If no deſcendants, the father and mother, brothers and ſiſters of deceaſed, by the whole blood, ſhared his property in equal portions (10).

portions of the eſtate into another name and family. The Inſtitutes ſay, "Commodius videbatur ita jura conſtitui, ut "plerumque hæreditates ad maſculos confluerent." Lib. 3. tib. 2.

(10) Not ſo by our law. With us the father excludes not only the mother, but the brothers and ſiſters: if no father alive, the mother excluded brothers and ſiſters, until the ſtatute 1 James II. in England, and William III. in this country, admitted them with her. And ſo the whole aſcending line, as Lord Holt obſerves in the caſe of Blackborough and Davis, 1 P. Wms. 51. was preferred until the ſtatute of diſtributions ordained that a nearer collateral ſhould be preferred to a more remote lineal: in that caſe the grandmother was preferred to the aunt, both as to adminiſtration and as to diſtribution, not becauſe in the aſcending line of kin, but becauſe ſhe was nearer of kin according to the computation of the civil law; for, *after the ſtatute of diſtributions*, her being in the aſcending line ſimply would not have given her a preference.

3. If the parents of inteſtate died before him, his brothers and ſiſters, by the whole blood, came in, in preference to his grandfather or grandmother (11).

4. If *ſome* of the brothers of the inteſtate by the whole blood ſurvived him, but *others* were dead, leaving children, thoſe children took per ſtirpes their father's reſpective portions jure repreſentationis: but if *all* the brothers and ſiſters of inteſtate died before him, the right of repreſentation was not extended to their children; in that caſe the parents or neareſt aſcendants living, however remote, came in, in preference to the nephews and nieces of inteſtate, or any other collaterals (12).

(11) The rule in our law is the ſame as to perſonal eſtate. This is the famous queſtion argued by Voet againſt Domat and others. Voet's opinion is confirmed by Lord Hardwicke, and eſtabliſhed as law with us in the caſe of Evelyn and Evelyn, 3 Atkins, 762. Same caſe is reported by Ambler.

(12) We have obſerved in the preceding note, that the brother was preferred to the grandfather; but it appears by the rule above, that a deceaſed brother's ſon was poſtponed to him, and indeed to any other aſcendant, unleſs there was ſome other brother ſtill ſurviving. This ſeems to be contradicted by Wood, who ſays brothers and ſiſters children are admitted with the aſcendants in the right line—but I think it is expreſsly delivered in the 127th Novel. cap. 1. which firſt gave the right of repreſentation; and after mentioning that brothers children had been by a former law totally excluded, goes on, Si moriens relinquat aſcendentium ali-

5. No brother or ſiſter by the whole blood ſurviving inteſtate, and the aſcending line being

quem, & fratres qui poſſint cum parentibus vocari, & alterius præmortui fratris filios tum cum aſcendentibus et fratribus vocantur etiam præmortui tui fratris filii. Upon which Heineccius thus comments: Si ſoli exiſtent germanorum liberi, illi ab aſcendentibus excluduntur; and Sir William Blackſtone ſays, 2 Comm. p. 214, he *apprehends* that, by the civil law, if *all* the brothers and ſiſters were dead, their children took per capita, not per ſtirpes, in their own right, and not jure repreſentationis.

Here again, I apprehend, the rule of our law, as to perſonal eſtate, agrees with the civil, as in preferring the grandfather to the nephew of the inteſtate, if all the inteſtate's brothers are dead, but not otherwiſe. It does not indeed (ſince the ſtatute of diſtributions was made) agree with the civil law, in preferring all the aſcendants in ſuch a caſe to the nephew, becauſe that ſtatute prefers a nearer collateral to a more remote lineal; but that it does agree in preferring the grandfather, who is nearer of kin where the nephew does not take jure repreſentationis, appears, I think, from the caſe of Walſh and Walſh. Prec. in Chan. 54. Keilway and Keilway, 2 P. Wms. 344. Davers *v.* Dewes, 3 P. Wms. 40. Lloyd *v.* Tench, 2 Veſey, 213. and Stanley *v.* Stanley, 1 Atks. 455. In the laſt caſe, the chancellor ſays, the words of the ſtatute of diſtributions do ſuppoſe that there muſt be ſome perſons to take in their own right, and others by way of repreſentation. On the ſame principle in the caſe of Durant and Beſtwood, 1 Atk. 454. an aunt and nephew were decreed equally entitled, becauſe equally of kin, and no repreſentation allowed, no brother being alive. It muſt be carefully noted, however, that this rule does not extend to caſes under the ſtatute of

ſpent, next came in nephews and nieces by the whole blood, in preference to brothers of the inteſtate by the half blood.

6. Brothers and ſiſters by the half blood, and their children, the nephew by the half blood excluding the uncle by the whole (13).

William III. which enabled brothers and ſiſters to ſhare with a mother. In the ſame caſe of Stanley and Stanley, nephews and nieces of inteſtate were decreed to ſhare with his mother and widow, though no brother or ſiſter of the inteſtate living.

(13) I have taken theſe two laſt rules of ſucceſſion verbatim from Wood, not being able to ſatisfy myſelf from the original authorities, though it ſeems ſomewhat difficult to ſee the reaſon of them, or to reconcile them with the preceding; for if there was no repreſentation where all the brothers were dead, why ſhould the nephew be preferred to the uncle, any more than he is with us in ſuch a caſe? Perhaps theſe rules ſuppoſe a brother of the half blood at leaſt to be ſtill living.

Our law here differs, not only in putting uncles and nephews, where the nephews take in their own right and not jure repreſentationis, on a footing, but alſo in not poſtponing the half blood, or making any difference between it and the whole as to perſonal eſtate. Sir William Blackſtone, in his note on this ſubject to book 2. ch. 32. of his Commentaries, ſeems not to attend to this preference of the whole blood, or to the narrow limits of the right of repreſentation. Note! it has not been determined that the half blood ſhould ſucceed equally with the whole under the ſtatute of James II. ſaid by L. C. Wallis and Hodſon, 2 Atkyns.

7. Other collaterals according to proximity.
8. Huſband to wife, or wife to huſband (14).
9. The exchequer by eſcheat (15).

Having thus ſtated the canons of deſcent as finally regulated by the novels; it may be requiſite briefly to mark how the law ſtood antecedently in ſome remarkable inſtances, which occaſion much diverſity, even between the novels and the inſtitutes, which were previouſly publiſhed.

By the old law, lineal deſcendants through a female had been poſtponed to all collaterals, but latterly had their remedy with the prætor.

(14) With them, therefore, the huſband and wife did not ſucceed to each other; but on failure of all the other relations of each party, and with us as to real eſtate, they cannot ſucceed each other at all. But amongſt us the huſband has an excluſive right to all the wife's perſonal property, as well as to adminiſtration to her, without being obliged to diſtribute among her next of kin (See 2 Mod. 20. and the expreſs words of the ſtatute of diſtribution), and the wife ſurviving ſhares with the children or other next of kin.

(15) So with us, the crown is entitled if no kin can be found. In ſuch caſes, therefore, a ſuit is commenced in the eccleſiaſtical court, in the name of the attorney-general, for the adminiſtration, &c. If, indeed, the want of kin ariſeth not from natural events, but from legal ordinances, as e. g. from the deceaſed being a baſtard, dying without a wife or children, the humanity of the crown uſually ſuffers his next of kin by nature, though not recognized by the law, to get adminiſtration as the appointees of the attorney-general, or of the crown, by letters patent. See 3 P. Wms. 33.

There was originally no repreſentation among collaterals. The novels gave it as far as brothers and ſiſters children, but this was ſubſequent to the æra of the inſtitutes.

A mother, by the ancient law, did not ſucceed to the eſtate of her children (16), nor the children

(16) This rule, which was alſo that of our law in ancient times, as to perſonal as well as real eſtates, has given occaſion to one of the moſt celebrated wits of modern days, to put in the mouth of one of the pleaſaneſt creatures of his brain, this laughable obſervation:—*I cannot be perſuaded*, ſays he, *but that the Ducheſs of Suffolk was ſome relation to her ſon.* To underſtand the whole wit of this, the reader muſt peruſe the following ridiculous, but gravely delivered, extracts from Swinburne;

" It hath not only been a queſtion amongſt the beſt " lawyers in the land, whether the mother be of kin to " her child, but after much diſputation it hath alſo been ad- " judged in the negative, viz. that the mother is not of " kin to her child, in the caſe of the Ducheſs of Suffolk, " in the reign of Edward the Sixth. What the reaſons " were, whereby the civilians were moved to be of this " opinion, I cannot, ſays Swinburne, eaſily conceive, un- " leſs it were this, that *mater non numeratur inter con-* " *ſanguineos*, or unleſs it were the ancient law of the Twelve " Tables, which excluded the mother from ſucceeding to " the inheritance of the ſon or daughter. But the reaſons " which moved the temporal lawyers to be of this mind " were, Firſt, becauſe lands cannot aſcend, and therefore " they concluded the ſame of chattels. Secondly, becauſe " the children are of the blood of the parents, yet are not " parents of the blood of their children. Thirdly, becauſe " the father, mother, and child, though three perſons, yet

to the eſtate of the mother. But by the Sc.tum Orficianum, paſſed before the inſtitutes, the children were admitted to the benefit of this natural right; and by the Sc.tum Tertullianum, alſo prior to the inſtitutes, the mother could ſucceed to the children, but the grandmother could not till the 118 novel.

This law of ſucceſſions, though from it the ſtatute of diſtributions has by ſome been ſaid to be copied, and all admit a ſimilarity in many reſpects, yet contains ſome ſtriking differences from that remarkable act of our legiſlature. In the very firſt ſtep of the latter, where there are a widow and children, the widow has her legal ſhare; whereas in the Roman law ſhe did not come in until all, even the collaterals, were exhauſted. So in the next ſtep, viz. where there are no children, ſhe has a moiety, a thing unknown to the Roman law: if, indeed, neither widow nor children, then the next of kin are to be inveſtigated and looked for according to the rules of the civil law (and ſo in looking for an adminiſtrator), with this difference only, that with them the aſcending line took place of all but brothers and ſiſters; with us, as we have noted, a collateral in nearer degree takes place of an aſcendant in one more remote. We muſt add to theſe obſervations the following: that the half

" are but *una caro* one fleſh, and conſequently no degree of " kindred betwixt them."

Quis talia legens—temperet a riſu?

blood is not poſtponed by us, as with them, and that we admit the huſband to ſucceed to the adminiſtration of the wife's perſonal property, in preference to every other relation; whereas Rome poſtponed him to them all, with regard to every ſpecies of her property (17).

(17) Beſides the caſes referred to in the foregoing chapter, whoever wiſhes to be better acquainted with the ſtatute of diſtributions, which has given riſe to as much controverſy, and as many doubts, as almoſt any in the ſtatute book, and which Lord Hardwicke obſerves in Stanley *v.* Stanley, 1 Atk. 455. to have been moſt incorrectly penned, would do well to conſult amongſt others Pett *v.* Pett, 1 Salk. 250. which determined that one brother's grandchildren cannot ſhare with another brother's children. Palmer and Elliot, 3 Mod. 51. and Carter and Crawley, Raymond, 496. in which an account is given of the contention between the common law and eccleſiaſtical courts which gave riſe to this ſtatute, and Edwards *v.* Freeman, 2 P. Wms. 441 *. where Sir Joſeph Jekyll ſtates at large the occaſion of making it, which was in favour of the practice of the ſpiritual court, which had endeavoured to force adminiſtration to diſtribute, but was conſtantly prohibited by the temporal court, becauſe it would have been allowing them to compel the execution of a truſt. The endeavours of the civil courts were truly laudable, yet Lord North aſcribes them to ſiniſter motives. T. Raym. 499.

* In this caſe, and Wallis *v.* Hudſon, determined that a poſthumous child takes under the ſtatute, according to the civil law, which conſiders ſuch child as born, as to every thing that reſpects its advantage. There is no determination that half blood ſhould take equally with the whole, where the caſe is under the ſtatute of James II

Beſides the caſes already mentioned, ſee that of Bowers *v.* Littlewood, 1 P. Wms. 593, which ruled, that between an uncle and a deceaſed aunt's ſon, the latter ſhall have no ſhare.

Witter *v.* Witter, 3 P. Wms. 102. that an eſtate per autre vie, is diſtributable in equity, though not in the ſpiritual courts.

Durant *v.* Preſtwood, 1 Atkyns, 454. that aunts and nephews are in the ſame degree of relation to an inteſtate, and equally entitled under the ſtatute of diſtributions, and in ſuch caſe no right of repreſentation.—They muſt take per capita, not per ſtirpes.

CHAPTER VII.

OF TITLE BY OCCUPANCY.

THE grand diviſion of titles to things made by Mr. Juſtice Blackſtone, is into thoſe by deſcent and thoſe by purchaſe. Juſtinian divides them into thoſe originating in the law of nature and nations, and thoſe founded on civil, municipal, or poſitive law.

Under the former he enumerates occupancy, acceſſion, and tradition. Under the latter, preſcription, donation, ſucceſſion by deſcent, by will, or by grant of the bonorum poſſeſſio.

The doctrines of the civil law on the heads of occupancy, acceſſion, or tradition, have been with his uſual perſpicuity compared with ours by Mr. Juſtice Blackſtone; and what Juſtinian ſays upon them in the 1. chap. 2. book of the Inſtitutes, is ſo plainly delivered, and ſo clearly arranged, that nothing but a culpable and ridiculous love of novelty will ever induce the inſtructor to depart from his order.

He divides occupancy into apprehenſio, ſeizing; and inventio, finding.

The prey acquired by hunting, and the plunder by war, formed the two claſſes of things which might be appropriated by ſeizure. Of game laws, it has been obſerved, the Romans had no notion; they knew of no reſtriction in killing game as to the ſportſman or the ſubject of his purſuit. Every man was at liberty to kill any beaſt or bird, feræ naturæ, within his own territories, but not upon another man's ground without conſent of the owner of the ſoil. Though a beaſt was wounded in the chace, no property was acquired in it till taken; and in game taken alive, there was only a qualified property, ſo that if it eſcaped it was liable to ſeizure and appropriation by the firſt occupant, unleſs it had animum revertendi, or diſcovered its owner by ſome mark annexed to it, as a collar, and in theſe reſpects our law agrees; fiſh, if taken in public rivers, became the occupants, but not if taken in public waters or ponds (1).

As to ſeizure in war, it gave in the opinion of the Romans, provided the war was juſt (and their ingenuity eaſily found pretexts for giving it a colour of juſtice), an uncontrolled power over

(1) Juſtinian particularly notices bees among creatures wild by nature, with an attention which ſhould ſeem to ſhew that honey was a produce of much more conſideration in ancient times than now; and Bracton, with a ſimilar attention, obſerves the coincidence of our law with reſpect to theſe animals.

the perſon of the captive: his immoveable property was transferred to the public or conquering ſtate; his moveables became the ſpoils which contributed to reward the private warrior (2).

If a man's goods were taken from him by robbers or enemies, and afterwards recaptured or recovered, they became or not the property of this new ſeizer or occupant, according as there was or was not at the time, a poſſibility left for the original owner to recover them. See Dig. 41. 1. 44 (3).

(2) The comparatively mild conſequences of war in modern times, ſhew in horrid contraſt the barbarity of the Romans. What ſhould we think of dragging a captive admiral, or general, at the wheels of a victor's carriage through the ſtreets, expoſed to the inſults of the mob, and then ſtrangling them in priſon? Yet ſuch was their conduct even to wretched princes, and to beautiful queens, from Perſeus to Zenobia. Their unrelenting purſuit of Hannibal and Jugurtha are but ſpots amongſt the thouſand black inſtances of the total abſence of every ſpark of generoſity from their mercileſs policy. Surely nothing but the early prejudice excited by the animated colouring and beautiful compoſitions of their wonderfully able writers, could make us ſpeak of the moral character of ſuch a nation with enthuſiaſm and admiration, much and juſtly as we may praiſe their laws, their taſte, and their genius.

(3) The Jus Poſtliminio would not operate in England, if the property was completely changed, quoad third perſons againſt recaptors, did not the prize acts direct all recaptured Britiſh property to be reſtored on ſalvage.

Invention, or finding, was either of things that never had been in the poſſeſſion of any perſon, as for example, a newly diſcovered uninhabited iſland, or of things of which, though once appropriated, the owner could not now be found. In both inſtances the imperial law, in purſuance of the law of nature, gave the property to the firſt occupant—the laws of England give it *generally* to the king (4).

Of the latter ſpecies, the moſt remarkable beſides waifs and eſtrays, are treaſure trove, and wrecks.

Treaſure trove, when the owner could not be diſcovered, belonged, by the civil law, to the finder, if found on his own, or on unappropriated ground. If upon the land of another, the law made a diſtinction between the diſcovery produced by accident and by ſearch, giving in the former caſe half, in the latter the whole, to the owner of the ſoil, Dig 41. 1. 31. 1. Code 10. 15. Inſt. 2. 1. 39. A tenant for long term of years, was conſidered as lord of the ſoil, and he, not the lord or proprietor, was to have the benefit of the

(4) *Generally* is added, becauſe there are exceptions, e. g. though treaſure hidden *in* the earth, afterwards diſcovered (the owner not appearing) belongs to the king, yet treaſure trove, if found *on* the earth, or in the *ſea*, would belong to the finder. Dr. Chriſtian, indeed, inſiſts that the general rules of our law reſpecting bona vacantia, agree with the civil, and that the king's rights are the exception.

diſcovery. The ſame rules extended to newly diſcovered mines (5).

Wreck.—The Rhodian laws having, in caſe of wreck, made the ſhip and goods ſeizable by the lord of the place, though all the perſons were ſaved and alive; therefore the Romans were more particular and expreſs in forbidding any man to meddle with ſuch goods as were wrecked, in making the plunderer to return fourfold, and in declaring that they remained the property of the original owner, without eſcheating to any body (6), unleſs for want of claim within a year and a day; in which caſe, by that law alſo, they eſcheated to the exchequer.

(5) With us, if a man grants his lands, all profits within the bowels of the land paſs, as mines of tin, lead, iron, coal, &c. Co. L. 4. a. If he let his land, open mines on it paſs, 2 Lev. 185. We have numerous ſtatutes in Ireland made to enable landlords, where mines are reſerved, to enter upon demiſed lands, in order to open and work mines under certain reſtrictions, and for various other purpoſes. Mines of gold and ſilver belong to the king, and a ſubject cannot have ſuch royal mines but by grant from him, and that in expreſs words, for a general grant of mines would not paſs them. Plowden, 336.

(6) See Lib. 14. Dig. de acq. rer. dom. and ſee lib. 47. Dig. tit. 9. de incendio, ruina & naufragio. Read alſo the Lex Rhodia de Jactu in the 14th book of the Pandects, and compare it with Molloy's chapter on Average and Contribution. And ſee the 2d volume of this work. See alſo the 3d chapter of the 2d volume of this work, on Droits of Admiralty.

By *derelicts*, were meant in the Roman law, things voluntarily abandoned with intention to leave them for ever (7). Things therefore thrown away from neceſſity, as to lighten a ſhip in a ſtorm, or things loſt by negligence or chance, were not derelicts. 2 Inſt. tit. 1.

The term derelict is applied in our law, but in a very different ſenſe, to lands gained by the dereliction of the ſea, which belonged to the king.

If no owner was found for lands, the civil law termed them hæreditas jacens, and gave them to the firſt occupant. With us, in ſuch caſe, they go to the king, except in the caſe of an eſtate per auter vie.

After occupancy, the civil law conſiders acceſſion, which was natural, artificial, or mixt.

Natural acceſſions were, Firſt, By procreation; thus title aroſe to the offspring of ſlaves, and the young of brute animals. Secondly, by alluvion, or ſecret inſenſible addition of earth, waſhed up

(7) Derelicts, ſays Harris, are by us called waifs and eſtrays; ſurely not, as appears from the deſcription which ſtared the learned commentator in the face in that text, to which he has affixed the note.

On the contrary, Wood ſays we have no derelicts; for though a man ſo abandon his property, he may change his mind and reclaim it again; perhaps ſo, but after a certain length of time, after a year and a day, his claim would come too late: however, ſuch voluntary abandonent of property is too imaginary to require much diſcuſſion.

by the ſea or a river (8). If indeed the impetuoſity of a river tore away a portion of ground, and joined it to a neighbour's eſtate, it did not become his until it had indiſſolubly coaleſced. Thirdly, By the riſing of an iſland in a public river or the ſea, a caſe which, however uncommon except in volcanic countries, our law has in its accuracy not forgotten (9). Fourthly, A river forſaking its natural channel, which is then divided between the owners of the adjacent lands.

Artificial acceſſions were,

1ſt. Specification.—The original owner of any thing improved by the act of another, retained his ownerſhip in the thing ſo improved, unleſs it was changed into a different ſpecies; as if his grapes were made into wine, the wine belonged to the maker, who was only obliged to pay the owner for the value of his grapes.

The ſpecies, however, muſt be incapable of being reſtored to its ancient form; not ſuch, for

(8) If lands are gained by the alluvion or dereliction of the ſea, or of a river, our law, if the increaſe be gradual and imperceptible, gives them to the owner of the land adjoining, if rapid, to the king. I have obſerved, in an introductory chapter, that ſuch events in torrid regions, where Ganges rolls his rapid ſtream, are much more frequent than in theſe countries, where the ſubject may appear rather immaterial.

(9) Giving the property to the king, and not to the occupant, as the civil law did.

inſtance, as a wrought veſſel that could be melted down; and the materials muſt have been taken in ignorance of their being the property of another (10).

2d. Adjunction.—When ſomething is added to a ſubject more than is in it, or than it had before, as embroidery to a garment, building on another man's ground, writing on another's parchment. The general rule here was, that the acceſſary follows its principal, and that the whole belongs to the owner of that principal, though the acceſſary be of greater value; thus the purple ſuperadded to a coarſe garment, would be carried with it to the owner of that garment, but though the property of the thing added was loſt, as long as adjunction continued, yet an action lay to have the thing added, ſeparated, and reſtored; or if that could not be done, to be compenſated in damages. If the adjunction was made by miſtake, and by the owner of the acceſſary, he might keep poſſeſſion until paid the value of the thing added (11).

Theſe principles, as they give trees planted, corn ſown, and buildings erected, in and upon the land

(10) Mr. Juſtice Blackſtone omits theſe two requiſites in his delineation of the civil law upon this ſubject.

(11) Our law agrees. See Dr. Chriſtian's note to page 404. 2 Bl. Com.

of another, to the owner of the land, ſo do they give to the owner of paper or parchment, the writing thereon; meaning ſurely, ſays Sir William Blackſtone, only the mechanical operation of writing; for, ſays the learned judge, the ſame law, where a painting has been done on another man's canvas, gives the canvas to the painter. I am very willing to admit the argument, that this reſpect to works of genius and invention in one caſe, implies it in the other; and very unwilling to admit an interpretation fraught with ſuch abſurdities as the contradictory of this opinion; yet Ayliffe and Wood have underſtood the following paragraph in its literal ſenſe: *Si in chartis membraniſve tuis carmen vel hiſtoriam vel orationem Titius ſcripſerit, hujus corporis non Titius ſed tu dominus eſſe videris* (12); and Juſtinian allows, that previouſly to his time, there had been a great diſpute, whether the moſt valuable picture ſhould not cede to the ownerſhip of the canvas.

It muſt be noted, that in the inſtances of building, planting, or ſowing, though the owner of the ground became maſter of the houſe, the tree, or the crop, yet he muſt pay for the materials, the workmanſhip, the ſeed, and the labour, if they were expended through miſtake and in error

(12) Inſt. 2. 1. 33. Titius anſwers to the J. S. of our law writers. The Romans have been perfectly ſilent on the ſubject of literary property.

of the true title, as common juſtice evidently required.

Confuſion.—Which meant a mixture of liquids. This, if made by conſent, became a mixed property, and ſo if by accident, unleſs there could be a ſeparation without any prejudice. Commixture meant a mixture of ſolids, which could not be in common unleſs by general conſent; if by accident, the heap was to be divided as nearly as the proportion of each man's property, or of the value thereof, could be aſcertained. If the intermixture was occaſioned by the wilful act of one man, without the knowledge or approbation of another, the ſole property was given to him who had not interfered in the mixture, ſatisfaction however being allowed to the other for what he had loſt (13).

Mixt Acceſſion.—The moſt remarkable title acquired in this mode, was to the profits of an eſtate poſſeſſed by a man bona fide, on an erroneous ſuppoſition of a title to the land, which in reality was not valid (14).

(13) Our law allows no ſuch ſatisfaction to ſuch fraudulent or officious or miſchievous intermixture; in other reſpects it pretty much agrees with the civil on this ſubject. See B. L. Com. 405.

(14) Every body knows the difference of our law upon this ſubject, and that the poſſeſſor, however innocent, muſt account for the profits, and indeed the Roman law meant

To acceſſion, the civilians refer the law of fixtures, here obſerving the uſual principles of acceſſion, by permitting the poſſeſſor to take away what has been erected or made by him, if it can be done without prejudice to the rights of the proprietor, or at leaſt giving the former a right to demand retribution to the amount of their value (15).

To theſe original methods of acquiring property by the law of nature and nations, viz. occupancy and acceſſion, the civilians add a third from the ſame ſources, which they term derivative, viz. *tradition* or *delivery*. But as delivery ſeems to be more properly referred to modes of conveying, than to origination of property, ſince the title is by the grant, of which the delivery is evidence, and to which it ought to be a concomitant, I ſhall beg leave to conſider it under the head of title by alienation, though I do not

only that he ſhould not pay for the produce of the ground actually conſumed, and not that he ſhould not account for rents received, &c. &c.

(15) See Dig. 25. Lib. and Wood, p. 96, octavo: the Engliſh lawyer knows how much our rules, with reſpect to fixtures, (which formerly were conſidered as immoveable, having become part of the houſe or building, 1 Inſt. 53. a.) have been relaxed of late years; a tenant, for inſtance, having been permitted to carry away not only things relative to trade, as mills, brewing veſſels, &c. &c. but even marble chimney-pieces, &c. &c.

deny that delivery by the Roman law was very often eſſential to the completion of the title, but it was not univerſally (16).

(16) For inſtance, it was diſputed whether legal delivery in its commencement, was a requiſite to title by preſcription, Ayliffe, 324; for the rules reſpecting delivery, and things to be conſidered therein, ſee Wood, p. 101. Ayliffe, 297. the property of things ſold was not transferred without delivery.

CHAPTER VIII.

OF TITLE BY PRESCRIPTION, ESCHEAT, FORFEITURE, AND ALIENATION.

PRESCRIPTION (1), or the acquiſition of property by continuance of poſſeſſion, is evidently a creature of municipal law, ſince no length of time could, by the law of nature, alter or diveſt a right once acquired. It originated, ſays Wood, with the Greeks; the divine law forbade it, as well as perpetual alienations.

Under the name of preſcriptions, the Romans, however, included not merely title to property, whether moveable or immoveable, corporeal or incorporeal, from length of poſſeſſion; but alſo limitation of ſuits, and even of perſonal ac-

(1) The title of preſcription, ſays Blackſtone, was well known in the Roman law by the name of Uſucapio, vol. 2. ch. 17. The Roman law, however, diſtinguiſhed between uſucapion and preſcription; applying the former to things moveable, the latter to immoveables; and ſurely there is a great diſſimilitude between the Roman preſcription and ours, as that of the civil law was applicable to lands, and not from time immemorial.

tions (2), which were barred or preſcribed againſt by length of time. The time which gave a right to preſcription, was three years for things moveable, ten years for things immoveable or incorporeal, if the perſon claiming right againſt the poſſeſſor was preſent, *i. e.* reſided in the ſame province (3), twenty if he was abſent; *i. e.* inhabited a different one.

Preſcription therefore with them was not immemorial uſage, but a certain length of poſſeſſion.

To make a valid preſcription, four things were requiſite, beſides the period of time ordained by law.

Firſt, That the poſſeſſion ſhould have been originally obtained honeſtly and bona fide, as far as regarded the mind and intentions of the purchaſer, though he might have been miſtaken in his title, or that of the vendor. And the canon law did away the preſcription, if at any time the purchaſer became really connuſant of his origi-

(2) Our law undoubtedly declares, that no preſcription can give a title to lands, but as length of poſſeſſion can give a title to lands, by ouſting the poſſibility of bringing any ſuit to recover them, it ſeems to be a declaration of little import, and indeed rather an odd proviſion, ſince the ſame law in fact ſays, no man ſhall claim a title to lands by immemorial uſage of holding them, and yet ſixty years poſſeſſion of lands in fee ſimple, uninterruptedly, ſhall be a title againſt all the world.

(3) The civilians allow ten years alſo to make a cuſtom. Hence the temporal courts will not ſuffer the eccleſiaſtical to try a cuſtom, and will iſſue a prohibition, if they attempt it.

nal error, and the conſequent imperfection of title.

Secondly, That the poſſeſſion was acquired for a lawful conſideration, as by donation, purchaſe, or ſucceſſion, *i. e.* for ſuch a cauſe as would entitle the receiver to the property, ſuppoſing the perſon from whom he received it to be the true owner; a tenant therefore could not preſcribe againſt his landlord, nor the poſſeſſor of a thing lent or depoſited againſt its true and rightful proprietor.

Thirdly, Uninterrupted poſſeſſion. Interruption of poſſeſſion was called uſurpation (4), and was either natural or civil. The former conſiſting in entering into and upon immoveable things, the latter in taking away thoſe moveable. Civil interruption was the interpoſition of a legal claim in a court of juſtice.

Fourthly. The thing muſt be capable of preſcription. Things ſacred and conſecrated to God were not liable to preſcription, and the ſame exception held as to the domains of the prince (5). The property of minors, of ſoldiers upon expeditions, and of perſons abſent on the buſineſs of the commonwealth, enjoyed the ſame privilege; and the ſubjects prohibited to be alienated by

(4) A term frequently introduced into the eccleſiaſtical law.

(5) Thus in our law, Nullum tempus occurrit eccleſiæ, Nullum tempus occurrit regi.

will, were incapable of being vindicated by pretence of poſſeſſion.

I have ſaid, that under this head, the civil law conſidered limitation of actions. Real actions, by which the civil law meant all actions for the recovery of property (6), brought by a man demanding ſomething that was his own, and founded on dominion, or *jus in re*, were of courſe limited as to the time of bringing them, by the reſpective periods which formed valid preſcriptions in the reſpective caſes mentioned above.

Perſonal actions, or thoſe in which a man claimed a debt or duty, and which were founded on obligation, or *jus ad rem*, and mixed actions in which ſome ſpecific thing was demanded, and ſome perſonal obligation alſo claimed to be performed, muſt regularly have been brought within thirty years. Code 7. 35. 5. to this however ſome exceptions are found in the ſame book of the Code, in its 39th Title: and the 9th of the Novels, allows the church to bring ſuch actions at any time within the period of one hundred years from cauſe accrued.

The civil law alſo eſtabliſhed a limit to the bringing or proſecuting of criminal proceedings,

(6) The meaning was not reſtrained to the recovery of what we call real property, the Romans knowing no ſuch diſtinction: As we have often obſerved, their grand diſtinction was into moveables and immoveables.

the right of accuſing being ordinarily limited to twenty years, and the ordinances of Scotland have followed this example (7).

ESCHEAT.—This title, in our ſtrict legal ſenſe of it, was unknown to the Romans, and in a more extended one takes up ſuch little ſpace in the civil code, that it is ſcarcely viſible, which is not ſurpriſing, ſince, as Sir William Blackſtone obſerves, eſcheat, ſtrictly ſpeaking, was one of the fruits and conſequences of feodal tenure: as far, however, as it denotes an obſtruction of the courſe of deſcent, which muſt frequently happen in all countries, and is therefore a caſe requiring proviſion in all laws, it muſt not be entirely omitted; nor is it diſregarded by the imperial law, ſufficiently attentive to the rights of the crown, however unacquainted with the claims of the feodal lord.

I ſhall, therefore, in imitation of the learned commentator on the laws of England, conſider the ſeveral caſes in which hereditary blood might be deficient according to the civil law, and a right to property thereby become veſted in the exchequer (8), not like the modern eſcheat, in con-

(7) Quere, whether ſuch limitation be not founded in reaſon?

(8) It may be remarked here, once for all, that fiſcus originally ſignified the proper money of the prince; ærarium the public treaſure. But the latter meaning in ſubſequent times was annexed to fiſcus alſo, and the privy purſe was denominated patrimoniale.

ſequence of any ſeignory or lordſhip paramount, but as the fruit of prerogative exiſting in the prince. The want of heirs I have already mentioned in the chapter of Deſcents, as occaſioning a devolution of property to the throne: to this deficiency, according to the courſe of nature, we muſt add unnatural births,—monſters being excluded from ſucceſſion by their law as well as our own; the civil, however, accounted them children, as far as related to any privilege of the parent, ſuch as the jus trium liberorum, whereas ours will not permit ſuch an offſpring to entitle the father to be tenant by the curteſy (9). I have alſo noticed, in the chapter on Marriage, the legitimation of baſtards produced by ſubſequent wedlock; and have elſewhere marked the admiſſion of the concubine and her ſon to one half of the inheritance, where no lawful wife or child, and the ſucceſſion of the baſtard to the mother's inheritance, although ſhe was never married, though not to the father's (10). With theſe exceptions, baſtards at Rome were, as well as baſtards in Britain, incapable of inheriting. But the offſpring of inceſtuous marriage, or of adultery, could not inherit even to the mother (11). Aliens alſo were incapable of being deviſees, as well as of being heirs; ſince the general principle of the civil law was, at leaſt till the time of Antoninus,

(9) See F. f. 1. 5. 14. Co. L. 29.

(10) See note to p. 186. (11) Nov. 89. ch. 15.

that foreigners had no right to the laws or privileges of any particular place where they ſojourned (12), and the cruel incapacities of ſucceeding to them, or the droits d'aubaine, formely known to France and Holland, are ſaid, by Domat, to have originated in the civil law (13).

The doctrine of eſcheat by corruption of blood, would in vain be looked for in the imperial law. It came into England with the conqueſt, and was unknown even to the Saxon tenures.

FORFEITURE.—But though eſcheat, in conſequence of crimes, is a creature of modern times, yet forfeiture of property for offences was familiar to the Romans, and indeed incident to all capital offences, until Juſtinian moderated the ſeverity of the law in certain particulars (14). Of the

(12) See Ayliffe, book. 2. lib. 3. and l. 1. Code de hær. inſ'.

(13) See Ayliffe, book 3. lib. 25. vacantia mortuorum bona tunc ad fiſcum jubemus transferri, ſi nullum ex qualibet ſanguinis linea vel juris titulo legitimum reliquerit inteſtatus hæredem. But the treaſury was barred by non claim during four years, and in ſeveral excepted caſes did not come in at all; the church being preferred if the deceaſed had been a clergyman, and any corporation if he had been a member thereof.

(14) The alterations by him made will come properly under the head of Public Wrongs. It is worthy of the civilians obſervation, that with us the goods of traitors and felons, &c. &c. found within the admiralty juriſdiction, are droits or perquiſites of the admiralty; ſo are wrecks, jet-

other cauſes of forfeiture enumerated by the Engliſh law, the moſt remarkable are lapſe, ſimony, and bankruptcy.

The right of lapſe having been eſtabliſhed about the time of the council of Lateran, as late as the reign of our Henry the Second, of courſe is unnoticed by the Imperialiſts, and the law of ſimony muſt be traced through the proviſions of a different juriſprudence, that of the canoniſts (15).

Bankruptcy.—This title is noticed in the 3d book, 26th title of the Inſtitutes, under the name

ſan, flotſan, ligan, derelicts, and deodans, not granted to the lords of manors, or others; and ſo are all the goods of the king's enemies taken without commiſſion, or found, or by accident brought within the admiralty commiſſions. See Comyn's Admiralty, D. and the caſes there referred to. There have been of late ſome important queſtions reſpecting the droits of admiralty in Ireland, which are not yet decided.

(15) The common law of England has not conſidered ſimony in the light of a ſpiritual crime (under which conſideration it has left it to eccleſiaſtical cenſures) but merely as the ſource and cauſe of invalidating agreements tainted by it. The ſtatute law, however, of that country, has by proviſions, *not yet imtroduced into Ireland*, impoſed pecuniary penalties on the parties concerned in ſuch corrupt agreements; the eccleſiaſtical courts in puniſhing it, are guided by the canon law as far as received in theſe countries, but the limits of this reception do not ſeem to be accurately aſcertained; for inſtance, whether they extend to *reſignations*, has been lately made a queſtion in Ireland.

of Ceſſio Bonorum. Bankruptcy, through vice or folly, was declared infamous and generated infamy at Rome; and fraudulent alineations to prevent its effects, and attempts of debtors to defeat their creditors, were guarded againſt by proviſions which may be found in the forty-ſecond book of the Pandects, 8. 10.

All perſons who became inſolvent, and fraudulently concealed or abſented themſelves, became bankrupts at Rome, whether traders or not; they were called decoctores, and the method of proceeding againſt them is pointed out in the forty-eighth book of the Pandects, 17. 5. If they became bankrupts through their own vice or folly, they were expelled from the college of merchants, and not ſuffered to trade again. Bankrupts from riotous living were put to hard labour for their creditors, and knaviſh bankrupts concealing their effects were puniſhed with death. If bankrupts became ſo by real misfortune, on delivery of their effects, the debts to anſwer which they were not adequate, were poſtponed; but the fruits of their future induſtry remained always liable (16).

(16) Not the whole fruits, but as much as they were able to pay; ſee 4th book of the Inſtitutes, 6. 40. What merit ſhould be allowed to the framers of our bankrupt laws, will be evident on peruſal of the text above, and how little their invention was put to the rack, having the Roman law before their eyes, from which they borrowed almoſt every idea. See Ayliffe, 347.

Alienation.—I ſhall here conſider who might alien, and to whom; what things were unalienable, and how a man might alien.

All perſons might alien their property who were not under ſome ſpecial diſability created by the law; theſe diſabilities therefore are the chief matter for our conſideration. The eighth diviſion in the ſecond book of the Inſtitutes bears this title, Quibus Alienare Licet vel non Licet. It begins with the huſband, who could not alienate lands which came to him in right of his wife as a marriage portion; and then proceeds to mention the mortgagee, who, though not owner of the pledge, may ſell it, and the minor, who, though maſter of his fortune, cannot alienate any part of it without the conſent of his guardian. This, however, is a very imperfect enumeration of the perſons forbidden to alien by the civil law, for we muſt add ideots, lunatics, prodigals, perſons baniſhed during their life, heretics, and traitors (17). Aliens appear to have been under almoſt every diſability known among us, until Antoninus communicated the jus civitatis, to all the inhabitants of the empire.

Things ſacred and religious, and in general all

(17) See Pandects 36. 5. 15. that condemned perſons, after ſentence, could not aliene. Ideots, infants, perſons attainted of treaſon or felony, are prohibited to aliene by our law.

things *not in commerce*, and the goods and property of the church, and the crown lands, could not be alienated (18); and the civil law was particularly careful to prevent what we call champerty, by forbidding things litigious to be alienated, (meaning by things litigious, thoſe about whoſe property there was any diſpute) during the time of the conteſt.

As to the modes of transferring property, the ſtudent muſt not expect to find precedents of conveyances as he would in the common lawyer's library, nor has the imperial law gone into a detailed account of different ſpecies of deeds in the manner purſued by Mr. Juſtice Blackſtone; but it is ſaid in general, that things muſt be transferred by delivery, and diſtinguiſhed delivery into true and feigned.

True delivery was handing over the thing if moveable, and giving poſſeſſion of it if immoveable. Poſſeſſion of part might be given in the name of the whole, and by proxy, as well as by the owner himſelf (19). Feigned delivery was when the intention of the teſtator being ſuffici-

(18) If it came to the church from a private donor, it might be alienated from neceſſity to pay the debts of the church. See Nov. 7. de non alienandis rebus eccleſiaſticis: as to crown lands. See Code 11. b. 2. The meaning of things *not in commerce* has been explained before.

(19) See Inſt. 2. 1. Dig. 41. 2. 3.

ently expreſſed, a ſolemn delivery was ſuppoſed, though not actually made, which fiction was peculiarly neceſſary in paſſing incorporeal eſtates. Thus a feigned delivery might be made by delivering a deed containing the deſcription of the thing intended to be conveyed (20). Thus delivery of the keys gave a poſſeſſory right to a houſe, and even verbal delivery of the poſſeſſion of lands at a diſtance, if within view, was a good delivery of them (21).

The private written inſtruments, chiefly noticed by the civil law, are *cautio*, a note or bill for money received; *apocha*, the creditor's receipt or acquittance on the debt being paid; *antapocha*, a tenant's acknowledgment that he had paid rent to a landlord, ſeemingly intended for the ſame purpoſes with our attornment; *literæ*—letters commendatory, teſtimonial, or credential; *chirographa*, which may be compared with deeds poll;

(20) This effect of deeds in the Roman law is particularly recognized in Code 8. 54. 1. where they are called inſtrumenta.

(21) Dig. 41. 2. 18. 2. it was called the fictio brevis. manus, if goods being already in a man's poſſeſſion as a pledge or loan, were afterwards given or ſold to him; if the thing was ſhewn at a diſtance, it was delivery longa manu. If ſome token was delivered, as a key or a deed, it was called ſymbolical. But upon ſymbolical deliveries ſee the dicta of Lord C. in Ward and Turner, 2d Veſey.

and *fyngrapha*, which anſwered to deeds indented (22).

(22) Syngrapha are mentioned by Cicero and Plautus; in the latter, though poetical authority may not be very good in ſuch caſes, is one of the few precedents of them handed down to us. Chirographa are ſpoken of by Juvenal. As to *facta* for deeds, and *dimiſſio terrarum* for a leaſe, they are phraſes of modern corrupted latinity.

CHAPTER IX.

OF TITLE BY GIFT, INTER VIVOS, MORTIS CAUSA, AND PROPTER NUPTIAS.

GIFTS were by the Romans diſtinguiſhed into proper and improper. The proper gift, or donatio inter vivos, was when one out of mere liberality, and urged by no other motive, beſtowed any thing upon another. The improper, when his liberality was urged by the proſpect of death, or elicited by reaſon of marriage.

The ſtudent will be ſurprized to find the civil law elaborate and prolix on the ſubject of gifts inter vivos, which by ours are little noticed, or confounded with grants; but I ſhould think his time miſpent in examining this head further than to note the following particulars (1).

Gifts were revocable for three cauſes only (2).

Firſt. Where the gift was inofficious, viz. depriving the next of kin of their equitable ſhare.

(1) He may compare theſe gifts, however, with our voluntary ſettlements, or gratuitous bonds.

(2) With us, a gift abſolutely made, without providing a power of revocation, cannot be recalled; but ſee the caſe of Naldred *v.* Gilham, 1 P. Wms. 577.

Secondly. For ingratitude to the giver, the degree of which however was not left to be determined by fancy, but aſcertained by law, and limited to five inſtances, viz. defamation of the character, or aſſault of the perſon of the giver, ſnares againſt his life, injury to his property, or refuſal to fulfil agreements entered into at the time of the gift. See Code 8. 5 b. 10.

Thirdly. If the giver afterwards happened to have children (3).

If the gift exceeded the value of five hundred crowns, it muſt have been publicly regiſtered at the time of the gift made (4), with certain exceptions mentioned in the eighth book of the Code, among which were gifts made by the Emperor, or to him, but latterly the conduits of his liberality were confined to public inſtruments, ſubſcribed with the royal ſignature and atteſted by witneſſes. Perſons doating, madmen, prodigals, and minors, were not capable of making gifts; nor perſons born deaf and dumb, nor married perſons to each other, as we have noticed before in the chapter on marriage; a ſon, under the father's power, was not capable of receiving a gift to his own

(3) Compare with this proviſion the various caſes in our report books, reſpecting revocation of wills by marriage, or the birth of a child.

(4) Code 8. 54. 27. here is one inſtance of a public regiſtry of deeds at Rome; in France the law was the ſame. Groenweg.

uſe, for he could only take for the father's benefit: things ſacred or public could not be made the ſubject of a gift, nor could, as it ſhould ſeem, contingent rights. See 8 lib. Code 24, 39, and 42, of the Pandects.

DONATIO MORTIS CAUSA. The ſeventh title of the ſecond book of the Inſtitutes, and the ſixth chapter of the thirty-ninth book of the Pandects, have for their ſubjects *donationes mortis cauſa*, and are to be particularly recommended to the ſtudent's peruſal. The definition given in the latter is this: *mortis cauſa donatio eſt, cum quis magis habere ſe vult, quam eum cui donat, magiſque cum qui donat, quam hæredem ſuum* (5). It then enumerates three ſpecies of theſe donations, one induced by no apprehenſion of preſent danger, but merely by the general conſideration of mortality; another when a perſon apprehending imminent danger ſo gives, *ut ſtatim fiat accipientis*; the third, when any one induced by danger does not give ſo that the property ſhould paſs at the time, but only when death ſhall have followed, *tunc demum cum mors fuerit ſecuta*: and it obſerves, that theſe inducements may be not only ill health, but impending danger from an enemy, from robbers, or from the hand of power, or a projected journey, or voyage, or even

(5) It gives as an inſtance the gift made by Telemachus to Piræus, in Homer. Odyſſey, book 17.

wearineſs of life, occaſioned by extreme old age (6).

The Inſtitutes, without making this triple diviſion of ſuch donations, preface the ſame general

(6) In Ward and Turner, 2 Veſey, 431. Lord Chancellor Hardwicke takes notice of the three kinds of donationes mortis cauſa, and thus deſcribes them: The firſt is a donation by one in no preſent danger, but in conſideration of mortality if he died, and this is ſtrictly compared to a legacy, for the property was to paſs at the death, not at the time; the ſecond kind is, where the property paſſed at the time defeaſible, in caſe of an eſcape from that danger in view, or of a recovery from that illneſs; the third was where, though he was moved with that danger, yet not thinking it ſo immediate as to veſt the property immediately in the perſon, he put it in poſſeſſion of that perſon as an inchoate gift to take effect in caſe he ſhould die.

In Tate and Hilbert, 1793, 2 Veſey, jun. 111. the Lord Chancellor ſeems to underſtand the two firſt ſpecies in a different ſenſe, and ſays, they were evidently mere donations, and according to a note which I took in Bilby and Coulter, in the exchequer in Ireland, 1791, that court ſeemed alſo to conſider the two former as in fact and effect, donations inter vivos. The truth is, the Roman lawyers ſeem to have fallen into a confuſion of expreſſion, by conſidering gifts to take effect preſently and irrevocably, as donationes mortis cauſa, if they were made while under apprehenſion of danger of death. To correct this the Dig. lib. 39. c. 27. ſays, *ubi ita donatur mortis cauſa, ut nullo caſu revocetur, mors cauſa donandi magis eſt quam mortis caſu donatio: et ideo perinde haberi debet, ac alia quævis inter vivos donatio. Ideoque inter viros & uxores non valet.* And Swinburne, page 23, ſays, the laſt kind of gift, and not the firſt, is that which is compared to a legacy, but the

definition by another more particular; *mortis cauſa donatio eſt, quæ propter mortis ſit ſuſpicionem cum quis ita donat, ut ſi quod humanitus ſibi contigiſſet haberet is qui accipit; ſi autem ſupervixiſſet is qui donavit reciperet, vel ſi eum donationis pœnituiſſet, aut prior deceſſerit is, cui donatum ſit.*

The Inſtitutes, therefore, which were publiſhed after the Pandects, ſeem to be thus particular to prevent the confounding abſolute irrevocable gifts, though made under apprehenſion of death, with donationes mortis cauſa, properly ſo called. Whether delivery was neceſſary to make theſe gifts mortis cauſa good and valid, was a queſtion on which the civilians ſeemed not to have agreed, but Lord Hardwicke has reconciled their different opinions (7), by ſhewing, that an abſolute delivery of poſſeſſion was not requiſite to the firſt or third kind of gift before mentioned, but that in the ſecond caſe, where the property was to paſs immediately, it was required (8).

other two are reputed ſimple gifts, if the giver do not make expreſs mention of his death, and ſo they cannot be revoked. And it appears from Heineccius Antiq. lib. 2. tit. 7. ſec. 19. that ſome gifts that were irrevocable were at Rome improperly ranked among donationes mortis cauſa.

(7) In the aforeſaid caſe of Ward *v.* Turner, 2 Veſey, 431, in which caſe, ſays Mr. Cox, in thoſe excellent notes on P. Wms. which have done him ſo much honour, all the law upon the ſubject of donations mortis cauſa is collected.

(8) But by the civil law, as received or allowed in England, and conſequently by the law of England, ſays Lord

All perſons were capable of receiving donations mortis cauſa, that were capable of receiving legacies; and he who might make a teſtament, might alſo make a donation mortis cauſa; and a filius familias, who could not make a teſtament, even with the conſent of his father, could make a donatio mortis cauſa, his father permitting.

It was neceſſary to mention at the time, that the gift was made in contemplation of danger or of death: it muſt alſo have been made in the preſence of five witneſſes (9); but it was not eſſential that it ſhould have been made in the donor's laſt illneſs (10). The preſence of the donee ſeems to have been neceſſary, from Dig. 39. 6. 38. (11).

Chancellor in the ſame caſe, delivery is neceſſary to make good a donation mortis cauſa; and ſince delivery is neceſſary, of courſe the thing muſt be capable of delivery, and queſtions which have naturally ariſen in our law are, whether there has been a ſufficient delivery or not.

(9) This is not requiſite with us.

(10) This appears to be eſſential with us, and is expreſsly ſaid to be ſo in Blount and Burrow, 546. 1 Veſey, Jun. and in Millar and Millar. 3 P. Wms. 356.

(11) It is there ſaid, *mortis cauſa donatur quod præſens præſenti dat*; and the maſter of the rolls, in Lawſon and Lawſon, and 1 P. Wms. doubts whether that be not the caſe with us. But it does not ſeem to be neceſſary, by the determination in the caſe of Drury and Smith, 1 P. Wms. and by what was ſaid in the court of exchequer in Ireland, in Bilby and Coulter in 1791, according to a note I took at the time, of which caſe a much reſpected friend, Mr.

In the donation mortis cauſa, ſtrictly ſo called, the huſband could give to the wife (12); I have not found any mention in the civil law of the impoſſibility of annexing any condition to the gift (13), nor any diſcuſſion of the diſtinctions

Ridgeway, has given a report in a note to his edition of Reports of Caſes, in the time of Lord Hardwicke.

Heineccius Antiq. lib. 2. tit. 7. obſerves, that ſome abſolute irrevocable gifts had been claſſed under donationes mortis cauſa.

(12) So he can with us, Lawſon and Lawſon, 1 P. Wms. 441.

(13) No condition can be annexed to it according to our law, otherwiſe a teſtamentary diſpoſition might be grafted upon it, and the ſtatute of frauds evaded; in the caſe of Lawſon and Lawſon, the maſter of the rolls declares, that no ſuch gift, though in nature of a legacy, need be proved in teſtamentary form, it operating as a declaration of truſt upon the executor. On the impoſſibility of annexing any condition to a donatio mortis cauſa, reſted the determination of the court of exchequer in Ireland, in 1791, in the caſe of Bilby and Coulter, in which the ſuperior knowledge of the imperial law, poſſeſſed by the great and able judge who preſides on that bench, was ſo eminently conſpicuous.

For what things are ſo capable of delivery with us, and for other queſtions reſpecting donations mortis cauſa, ſee Ward and Turner, 2 Veſey 431. Lawſon and Lawſon, 1 P. Wms. 441. Drury and Smith, 1 P. Wms. 404. Millar and Millar, 3 P. Wms. 356. Snellgrave *v.* Baily, 3 Atkyns, 314. S. C. Ridgeway's caſes in Lord Hardwicke's time, and Bilby *v.* Coulter, in his note thereon. Jones and Selby, Prec. in Chan. 300. Tate and Hilbert, 2 Veſey, jun. 111. a bond, bill, or note, payable to bearer, is a

between things capable or incapable of delivery in this mode of giving.

Though after a long conteſt among the Roman lawyers, whether theſe donations partook moſt of the nature of gifts or legacies, it was ſettled in the Inſtitutes, 2 lib. 6. 7. that they ſhould be *ad exemplum legatorum redactæ per omnia*; yet, ſays Ayliffe, they differed from legacies in the following reſpects.

Firſt, as we have ſaid, a filius familias, though he could not bequeath a legacy, could make a donatio mortis cauſa.

Secondly, Theſe donations were ſometimes delivered by the perſon in his life time, ſometimes by his heir, but the legacy always by the heir.

Thirdly, The donee was obliged to render an account of his poſſeſſion, not ſo the legatee. Ayliffe, p. 332.

DONATIO PROPTER NUPTIAS. The *donatio propter nuptias*, was a ſecurity given to the wife for the return of the fortune ſhe brought

good ſubject of a donatio mortis cauſa. But not other promiſſory note or bill of exchange. Delivery of receipts for South Sea annuities not ſufficient, Ward and Turner. There can be no ſuch dónations of ſimple contract debts, or arrears of rent, becauſe there can be no delivery, ſaid by L. C. in ſame caſe.

In Tate *v.* Hilbert, Lord Chancellor is made to doubt, whether want of delivery might not in ſome caſes be ſupplied by deed or writing, though it could not by parol.

with the huſband, or of an equivalent to it, in caſe ſhe ſurvived him, or if they ſhould be ſeparated during life. It has been compared to a jointure, to which it bears ſome reſemblance, as being given in conſideration of the fortune brought with her; her fortune either proceeded from herſelf, her mother, or ſome other perſon, and was called *dos adventitia*; or from the father, or ſome of the paternal line, in which caſe it was called *profectitia*: no part of it by law ſurvived to the huſband, not even though there were children by the marriage, though cuſtom ſeems ſometimes to have ſuperceded law in this reſpect (14). I ſpeak of the courſe of law where no ſpecial ſettlement or agreement had taken place. The huſband's power over her property much reſembled that which our law gives him as to a wife's real eſtate where no ſettlement. The huſband received the profits, but could not alienate it if immoveable (15). If it conſiſted of moveables,

(14) At one period, if the huſband ſurvived, the dos profectitia reverted to the father, the dos adventitia remained with the huſband.

(15) Her lands he could not alienate, not her lands in the provinces, for no claim of uſucapion could be ſet up there, and an expreſs law forbade that title to be ſet up againſt her in Italy, againſt the fundus dotalis *Italicus*. With her conſent her lands in the provinces might have been alienated, until Juſtinian having extended the right of uſucapion to the *prædia* provincialia, the legal prohibition of alienation was at the ſame time extended to provincial eſtates.

the intereſts of commerce, and the neceſſity of diſpoſing of periſhable goods, permitted his alienation of it, excepting her *paraphernalia*, but he muſt make good the value to her, and to prevent any injury from ſuch diſpoſition, that part of his eſtate included in the donatio propter nuptias, which we may call his ſettled eſtate (and which was always of the ſame condition and quantity with her portion) could not be alienated or mortgaged by him, even with her conſent, unleſs in ſome ſpecified caſes of extreme neceſſity, or unleſs another eſtate of equal value was to be ſettled in lieu of it; and as a further protection to her, beſides this ſpecific ſecurity, ſhe had a general lien on all his property to the amount of her portion, and was preferred to all other incumbrances, even though of prior date (16); and if he became impaired in fortune, the wife might, even during her marriage, ſeize her portion or ſecurity, or bring an action for it (17).

But though the donatio propter nuptias was her ſecurity, yet ſhe was not put in poſſeſſion of it. The huſband, during marriage, received the rents, intereſt, or other profits, both of the eſtate by him ſettled, and alſo of her dos or portion, becauſe he was to be at the neceſſary charges of the

(16) See Code 5. 13. 36.

(17) Compare this with the act of parliament, 5 Geo. II. ch. 4. Ireland.

marriage ſtate; he was to maintain her though ſhe brought no portion (18).

We have obſerved, that though the property of the dos was not transferred to the wife, yet the profits of it, as well as of the donatio propter nuptias, were received by the huſband during marriage. But all her property need not be contained in the dos, part of it might be kept back, which was then called her *paraphernalia* (19); her goods therefore were *dotalitia*, of which the huſband had the uſe and adminiſtration, and *paraphernalia*, from *para* and *pherne* over and above her dowry. The *paraphernalia* included property of different kinds, and were not, as with us, confined to wearing apparel, jewels, and other ornaments, and theſe paraphernalia ſhe might uſe and alien at pleaſure, without the huſband's conſent, and bring actions in her own name, or in the name of her huſband, for the recovery of them (20).

(18) Of courſe he was liable to her debts for neceſſaries. The dos might be given before or after marriage. The father might be forced by the magiſtrate to give a portion with his daughter according to his eſtate and ability. See Pandects, 23. 2. 19.

(19) Even all ſhe acquired was his, *quodcunque acquirebat*. See Heineccius Rom. Antiq. lib. 1. tit. 10. ſec. 1.

(20) Our law differs conſiderably both in the meaning of paraphernalia, as appears above, and alſo in the extent of the wife's power over them. They are with us conſidered as the huſband's goods, uſed by the wife, and to which ſhe becomes entitled at his death, over and above her jointure

or dower; the husband, though he cannot devise them, may sell or give them away during his life; and though after his death they are liable to his debts, if his personal estate is exhausted, yet the widow may recover the value from the heir. See 1 P. Wms. 730. 2 Atks. 642. 3 Atks. 394. 2 Atks. 77 & 104. 1 Atks. 440. 1 P. Wms. 729. 2 P. Wms. 79. 544.

Where a husband's personal estate is not sufficient to pay his debts, the wife cannot set up any claim to jewels, rings, pictures, dressing plate, and other trinkets given her before marriage. Ridout *v.* Lord Plymouth, 2 Atks. 104.

CHAPTER X.

OF TITLE BY LAST WILL OR TESTAMENT.

THE property left by any perſon at his death, muſt either revert to the common ſtock, or ſome individual muſt be pointed out, who has or ſhall have a right to ſucceed to it. This right of ſucceſſion is of two kinds: the firſt is called legal ſucceſſion, when the property deſcends in the family according to the order of proximity (1). The ſecond, teſtamentary ſucceſſion, when that exact order doth not prevail, but the eſtate of the deceaſed is tranſmitted, according to his will and pleaſure, within certain reſtraints however, and limitations ſet by the law.

(1) As the origin of property, according to Blackſtone, is occupancy, it muſt terminate with the life of the occupant, unleſs continued in civil ſociety by the legiſlature. If the legiſlature did not interfere, the neareſt of kind, as being about his perſon, would naturally become the next occupants.

The legal ordinary ſucceſſion is the rule, the teſtamentary the exception (2); and this exception is ſeldom admitted in the firſt ſtages of government, and the firſt periods of ſociety. It requires ſome time and reflection to accuſtom a people to ſuch a power as that of diſinheriting, either totally or partially, the heir of blood—the natural heir.

A teſtament is thus defined by the Roman law: *Voluntatis noſtræ juſta ſententia de eo, quod quis poſt mortem fieri velit.* It was of two kinds—a teſtament ſtrictly ſo called, and a codicil: the eſſential difference between which was, that the former appointed a *hæres*, commonly called the *hæres factus* (who comprehended our two characters of deviſee and executor), the latter did not (3).

(2) Therefore deſcents ſhould be conſidered before wills, as I have done in imitation of Blackſtone and the Engliſh law, and in conformity with the opinion of Mr. Gibbon, though in deviation from the civil, and from the order of Juſtinian's Inſtitutes. The reaſon given for the contrary order by the civil law, and approved by Heineccius, is, *Quam diu ſucceſſor a teſtamento ſperetur, ab inteſtato hæredibus locus non datur*; a reaſon more whimſical than ſatisfactory.

(3) We uſe codicil in a different ſenſe, as an appendage to a laſt will or teſtament, and do not attend to the diſtinction above: teſtament (where it is a diſtinguiſhing name) meaning with us a will of perſonal eſtate.

Teſtaments were either ſolemn or unſolemn (4): the latter were alſo called privileged teſtaments, and both the one and the other might be either written or nuncupative.

SOLEMN TESTAMENTS]. So unnatural and contrary to all principles did it ſeem at firſt to the people of Rome, to diſinherit the heir of blood either totally or partially, that in the early ages of their ſtate it could not be done, but by an expreſs law (5). One law, that of deſcent, could only be counteracted by another, that of wills; the people were, therefore, ſolemnly interrogated in the *Comitia Calata*, whether they choſe to ratify a will; if they did, it became legal (6).

With the twelve tables, the power of tranſmitting property by will began, and they gave to

(4) Our deviſes of real eſtate may be compared to the ſolemn wills of the Romans, on account of the ſolemnities preſcribed by our ſtatutes of frauds; and our wills of perſonal eſtate (as not requiring the legal precautions of the ſtatute), to their unſolemn teſtaments; but a perfect analogy will by no means hold. For inſtance, deviſes of land do not appoint an heir, nor create a repreſentation, nor make the deviſee ſtand in the place of deviſor, as to all debts, and therefore differ widely from Roman wills.

(5) There was one exception from neceſſity entitled the mode *in procinctu*. Coriolanus found his army declaring to each other their wills, on the eve of a battle, with their garments tucked up; that is *in procinctu*. Plutarch's Life of Coriolanus.

(6) From hence the principle *teſtamenti factionem eſſe juris publici*. See Heineccius on the Inſt. 161.

every paterfamilias this power of willing (7), but preſcribed no form.

What then was to be done? The twelve tables had, in this reſpect, counteracted the firſt principles of law and the moſt rooted opinions, or perhaps prejudices of mankind (8). The lawyers found a medium (9); they conſidered wills in the ſame light with alienations *inter vivos*, as our laws do regard wills of real eſtate, and introduced cere-

(7) So in theſe countries a right to deviſe lands was not a common law right, but founded on ſtatutes, as is ſaid in the caſe of Anſty and Dowſing; but in Windham and Chetwind, a caſe equally well known to every lawyer, Lord Mansfield obſerving, that a power of willing ought to be favoured, and naturally follows the right of property, adds, it ſubſiſted in this kingdom before the conqueſt, and till about the reign of Henry the Second, when it ceaſed by conſequence of feudal tenure, not from any expreſs prohibition. The doctrine of uſes revived it—the ſtatute of uſes again accidentally checked it—this occaſioned the ſtatute of wills.

(8) Yet one would have ſuppoſed, from the Roman prepoſſeſſion for the paternal power, that their prejudices would have inclined the contrary way.

Lord Mansfield has obſerved, that the teſtamentary power over property is more reaſonable in theſe kingdoms than ever it was among the Greeks and Romans, ſince by reaſon of primogeniture, and other excluſive rules of deſcent, the ſucceſſion ab inteſtato amongſt us is not ſo equal and univerſal as among thoſe people.

(9) *Inveniendus erat color*, ſays Heineccius, *quo juris analogia ſerveratur*,

monies correſponding to this fiction; the will was ſaid to be made per æs et libram; it was a fictitious ſale, the teſtator ſold the property in the preſence, and as it ſhould ſeem with the approbation of five witneſſes preſent, who repreſented ſo many claſſes of the Roman people.

There was alſo an antiſtes, who witneſſed their concurrence, and the libripendens, who weighed the copper money given for the imaginary purchaſe by the familiæ emptor, making the neceſſary number of perſons preſent (beſides the parties) ſeven. The familiæ emptor was the deviſee or hæres factus. He paid over a piece of money to the officer who held the balance, to be paid over to the teſtator (10).

In progreſs of time the prætors (who were always employed in ſimplifying and ſoftening the ſtrict and harſh requiſites of the ancient laws) ratified a more ſimple form of teſtament, without any ſymbolical ſale, or rather they gave the *bonorum poſſeſſionem* according to the teſtament, with ſome ſimilitude to our adminiſtration *cum teſtamento annexo*.

If, then, the hæres factus could not ſet up the teſtament as agreeable to the ancient forms, he applied for aid to the prætorian court (11).

(10) The prætorian teſtament, ſays Heineccius, was improperly ſo called, becauſe it did not carry with it the inheritance, but only the *bonorum poſſeſſionem*.

(11) Among ſavage nations, obſerves Mr. Gibbon, want of letters is imperfectly ſupplied by the uſe of viſible ſigns,

All that the prætor required was, that ſeven witneſſes ſhould ſet their ſeals to the will: they repreſented the ancient five witneſſes ſuperadded to the antiſtes and libripendens.

At length, new imperial conſtitutions having been enacted, teſtaments began to be held valid, avowedly as teſtaments (not as ſales or alienations inter vivos), though made in a manner different from any of the modes above mentioned, if made by perſons capable of teſtation, and of things capable of being deviſed, according to certain rules, and with certain ſolemnities borrowed from the ancient rites, partly framed out of the Prætorian Edicts, and partly ordained by the Imperial Conſtitutions (12). From the ancient law was derived the neceſſity of witneſſes—and their preſence at one and the ſame time without interval. The number of theſe witneſſes, and their putting their ſeals, were circumſtances fixed by the Prætorian Edicts, and the Imperial Conſtitutions required the ſubſcription of the witneſſes and of the teſtator: Juſtinian himſelf added the neceſſity of the teſtator's heir's name being inſerted in the handwriting of the teſtator, or at leaſt by the witneſſes (13).

like a pantomime. Rome, in its earlier periods, though not in a ſavage ſtate, was in a very rude one. Imaginary ſale was uſed among them in alienations, adoptions, and almoſt every ſpecies of change of property.

(12) Theſe, if followed, rendered all application to the prætor unneceſſary.

(13) Inſt. 1. lib. 2. tit. 10. ſec. 3 & 4.

I ſhall now proceed to analyſe and diſcuſs more particularly theſe requiſites in the form and manner of making teſtaments, poſtponing for that purpoſe, at preſent, the conſideration of who could make wills—of what they could be made, &c. &c.

FORM AND MANNER OF MAKING *SOLEMN* WILLS ACCORDING TO THE CIVIL LAW.

The ſolemnities required were either internal or external. The internal was the appointment of an heir which was of the eſſence of the teſtament, and without it the will might be a codicil, but could not be a teſtament (14). The external were ſigning, atteſtation, unity of the act.

(14) This idea that the naming of an executor is of the eſſence of a teſtament, was formerly recognized by the judges of the common law; but they have ſince conſidered a will, in which no executor is named, as effectual to all intents and purpoſes. Noy. 12.

We may here obſerve how impoſſible it is to form any complete analogy between our wills, whether of real or perſonal eſtate, and the teſtaments of the Romans. Our deviſes of real eſtate, in reſpect to the ſolemnities attending their execution, may admit a fair compariſon with their ſolemn teſtaments; but the appointment of an univerſal heir, conſidered as partaking individuality with the teſtator, ſubject to all his debts even ſo as to affect his own property, being no part of the eſſence of our deviſes, here appears a manifeſt and great variation.

SIGNING]. The ſubſcription of the teſtator appears to have been neceſſary from Inſt. 2. 10. 3. and from the ſame authority we collect, that it was firſt required by the Imperial Conſtitutions. Dr. Harris refers it to a particular conſtitution of Theodoſius, which does not ſeem to me perfectly to juſtify his poſition (15).

If the teſtator, through ignorance or imbecility, was incapable of ſigning the will, an additional witneſs was called in, whoſe ſubſtituted ſignature authenticated the inſtrument; but if the deviſor had actually written the body of the will with his own hand, his ſignature at the concluſion became unneceſſary (16).

Our wills of perſonal eſtate, on the other hand, while the old opinion prevailed that the appointment of an executor was of their eſſence, might be compared in that reſpect to the ſolemn, and in not requiring certain ſolemnities to the unſolemn will of the Romans. Even now they cannot altogether be compared to the unſolemn at Rome, for the latter required the appointment of an heir.

(15) See Harris's notes on Juſtinian's Inſt. lib. 2. page 46. The Conſtitution of Theodoſius is repeated in the Code, b. 23. 21. It relates to the circumſtance of a teſtator's, chuſing to conceal the proviſions of his will from the witneſſes, and declares ſuch ſecrecy ſhall not invalidate it, provided the requiſites therein are complied with, in whoſe enumeration the teſtator's ſignature occurs. Our law agrees.

(16) Our law agrees. Lemain and Stanley, 3 Lev. 1. It was at one time very abſurdly judged, that teſtator's writing his name in the beginning of the will ſupplied the

The teſtator was not obliged to put his ſeal, though the witneſſes were (17).

The matter on which the will was written was immaterial, whether *tabulis, charta, membraniſve*, on tablets of wax, paper, or parchment, Inſt. 2. 10. 12. By a particular proviſion of Juſtinian mentioned above, the will was not only to be ſigned by the teſtator, but alſo the name of the deviſee, or heir appointed, muſt appear in the hand-writing of the teſtator himſelf, or of one of the witneſſes (18); and though the teſtator, inſtead of writing the will himſelf, might dictate it to another, yet if the writer was the heir or legatary, he was ſubject to puniſhment for the deed (19).

ATTESTATION]. I ſhall next conſider the number and capacity of the witneſſes required, to-

want of ſignature at the bottom: a determination mentioned by Blackſtone without diſapprobation, but very juſtly cenſured by Dr. Chriſtian.

(17) Nor is he by our law; but ſealing without ſigning was held ſufficient in Strange, 764. 1 Wilſon, 313. and 2 Veſey, 459. contra.

(18) See Inſt. 2. 10. 4. Cod. 9. t. 23. l. 29. Novels, 119. ch. 9.

(19) Code 9. 23. 3. And the paſſage ſays, that writers of wills, who had inſerted any benefit to themſelves, ſhould be ſubject to the puniſhments of the Cornelian law. This was the Cornelian law *de falſis* (there was another *de ſicariis*); its puniſhments were death to ſlaves, to freemen baniſhment and confiſcation of goods.

Notwithſtanding this caution, the legatary might be a witneſs to the will, as we ſhall ſee preſently.

gether with the mode of their atteſtation preſcribed by law.

The number was no leſs than ſeven to a ſolemn will, a number appearing to be determined in its origin by the claſſes of the Roman people, and by the fictions of the ſymbolical ſale (20).

The difficulty which muſt frequently have occurred in obtaining ſo great a number of witneſſes as ſeven, might probably induce the Romans to be leſs ſtrict than we are (as they certainly were) as to the perſons whom they admitted upon this occaſion. At one time the heir was admitted as a witneſs, though forbidden to be ſo by Juſtinian (21); but legataries were always admitted on this diſtinction, that they were particular, not univerſal ſucceſſors, *Qui non juris ſucceſſores ſunt*; and that a teſtament would be valid without legataries,

(20) Every one knows that the ſtatute of frauds requires three witneſſes to a will of real eſtate, and that to a written will of perſonalty the ſignature of witneſſes, though ſafe and prudent, is not indiſpenſably neceſſary: nor even the ſignature of the teſtator, though the will be in another man's hand-writing, if proved to be according to his inſtructions, and approved by him. See 2 Bl. Com. 501. Two witneſſes to a will—two to a codicil reciting that will, one of which laſt was alſo a witneſs to the will.—It does not ſatisfy the ſtatute. 3 Salk. 395.

(21) See 1 Burr. 426. The eſſence of the Roman teſtament was the appointment of an heir to repreſent the teſtator, not according to our ideas of repreſentation, but in the mode already ſufficiently explained in the chapter of Deſcent.

though it could not without the appointment of an heir: the objection to the heir as a witneſs not proceeding, according to great authorities, from his being intereſted, but, as is ſaid by Juſtinian, being a prohibition, *ad imitationem priſtini familiæ emptoris*; *quia hoc totum negotium teſtamenti ordinandi gratia creditur hodie inter teſtatorem & hæredem agi* (22). In ſhort, the heir was a party to the ſuppoſed contract, and therefore could not be a witneſs: the legataries were not.

The witneſſes muſt have been freemen, Roman citizens, adults, or at leaſt of the age of fourteen years, *teſtabiles*, i. e. *Quibuſcum erat teſtamenti factio*; and not members of the family of either heir or teſtator. The three firſt of theſe requiſites require no new explanation: but the fourth, as expreſſed by the Roman law, may be miſapprehended. The phraſe *quibuſcum erat teſtamenti factio* did not mean who could make teſtaments (for a woman could make a teſtament), but who could be preſent at the comitia calata, where teſtaments were originally made: this in itſelf excluded ſlaves, minors, thoſe deaf, dumb, and blind, prodigals and infamous perſons; to which are added the inſane, if inſanity could require any excluſion but that created by common ſenſe.

Of freedom from theſe incapacities, and of the witneſſes being in ſituations which rendered them competent, general reputation was ſufficient evidence. Thus, if a reputed freeman, but real ſlave,

(22) Inſt. lib. 2. tib. 10. See 1 Burr. p. 426.

happened to be a witneſs, the will was not thereby invalidated. 2 Inſt. 10. 7.

All the branches of the families of heir and teſtator were excluded, upon principles connected with the fictitious ſale, viz. becauſe they were ſuppoſed to be parties to the contract; and although the ſymbolical mode became obſolete, the rule was retained (23). All perſons in teſtator's power, or among his domeſtics, excluded. 2 Inſt. 10. 9.

Having thus mentioned five requiſites to the competency of a witneſs to the Roman teſtament (24), the reader might naturally expect ſome diſ-

(23) Ad imitationem priſtinæ emptionis.

(24) I hope the ſtudent will not think me departing too much from my ſubject matter, or performing an idle taſk, in abridging here the famous controverſy between Lord Mansfield and Lord Camden on the competency and credibility of witneſſes to a will, the ſubſtance of which it generally gives ſome trouble to young men to collect.

Witneſſes were not eſpecially neceſſary to a will of real eſtate, before the ſtatute of frauds; that ſtatute required the ſubſcription of three *credible* witneſſes. The word credible was an unfortunate word, and has occaſioned much diſpute, which the uſe of the word *competent* might poſſibly have prevented.

Hence, in the caſe of Anſty and Dowſing, Strange, 1254, the queſtion aroſe, whether the witneſſes to a will anſwered the deſcription in the ſtatute. The caſe was this: James Thompſon made his will of real eſtate, atteſted by three witneſſes, and gave to one John Hailes and his wife ten pounds each for mourning, and an annuity of twenty pounds to Elizabeth, the wife of John. John Hailes was one of

cuſſion of objections ariſing to their competency or credibity from their being intereſted; but here, in the opinion of no leſs a judge than Lord Mansfield, all enquiry is uſeleſs, ſince he has decidedly

the witneſſes to the will, and refuſed to be paid twenty pounds in lieu of his wife's legacy and his own: it was determined that the witneſſes to a will ſhould not be perſons who are entitled to any benefit under that will, and that John Hailes was not a good witneſs.

This caſe gave riſe to the ſtatute 25 Geo. II. ch. 6. in England, and ch. 11. in this kingdom, which declare all *legacies* given to witneſſes to be void, and thereby remove all poſſibility of intereſt affecting the teſtimony of legatees named, and directed the teſtimony of all *creditors* to be admitted, leaving their credit to be weighed by the court and the jury.

How the caſe of Windham and Chetwind, which was that of ſimple contract creditors witneſſing a will which charged the real eſtate with payment of debts, could occur after this ſtatute, does not at firſt ſight appear; but I ſuppoſe it was under the exception in the act relative to ſuits already inſtituted, the proceedings in that caſe appearing to have been commenced in Auguſt, 1750, and the retroſpect of the act being only to June, 1752.

In that caſe, in which the witneſſes had been paid off, before the trial, and which is reported in 1 Burr. 414, Lord Mansfield is of opinion, that the word *credible* in the ſtatute is either ſuperfluous or abſurd: if it means competent, ſuperfluous; if it means ſomething more than competent, abſurd, becauſe it would make the validity of a will depend on the credibility of the witneſſes, which would be abſurd, ſince the teſtator never could foreſee what credit might hereafter be given to them. As therefore competency only

laid down this position, that though in other cases the objection of interest to a witness was allowed, yet it did not incapacitate witnesses to a will by the civil law.

was required, he was also of opinion that such competency might be acquired subsequently to the attestation, as by payment, release, &c. &c.

In the case of Hindon and Kersey, 5 Geo. III. 1765, (which was the case of a devise towards the support of the poor in a certain township, to which two persons liable to be assessed to the poor tax in said township were witnesses, and which case was not cured by the act 25 Geo. III.) Lord Camden held that the word *credible* in the statute exactly means competent, and that to give it another meaning, viz. that of credibility in the ordinary sense of the word, would be absurd. So far he agrees with Lord Mansfield; but as to its being a superfluous word, he differs widely, and the tenor of his argument is, that it was inserted to mark that this competency must exist at the time of the attestation, and cannot be acquired by any subsequent act, such as a release; and that the contrary doctrine held by Lord Mansfield in Windham and Chetwind, originated in his considering this word as superfluous, or having no legal meaning.

Lord Camden held, that the word *credible*, in the statute of frauds, meant competent. Lord Mansfield, that if it did not mean that, it meant nothing; so far they agreed: but herein they differed, that Lord Mansfield said it was a superfluous word (its meaning being included in the word witness); and also that witnesses, though incompetent at the time of the attestation, yet if they became competent afterwards, were good witnesses to the will. Lord Camden held, that they must be competent at the time of the

I have not courage to oppoſe that very great and moſt learned judge upon the point, though I think I ſee authorities to the contrary; and it ſurely is an exception very inconſiſtent with the uſual wiſdom of the civil law, which appears to ſhew a laudable jealouſy upon all ſimilar occaſions.

Lord Chief Juſtice Lee was of that opinion, though miſtaken in his authorities. Quoting the following paragraph from Dig. lib. 28. tit. 1. c. 22. (*conditionem* teſtium *tunc* inſpicere debemus, *cum ſignarent*, non mortis tempore), he argued from thence, *that intereſt was an objection*, which, if exiſting at the time of ſubſcribing, could not be taken off by any ſubſequent fact; but Lord Mansfield has ſhewn, that *conditio teſtium* means

atteſtation, and that to mark this very thing, the word *credible*, as an emphatic word, was inſerted.

Want of attention to the plain truth uttered by Lord Mansfield in Windham and Chetwind (that to make the validity of a will depend upon the credibility of witneſſes, which the teſtator cannot foreſee, is abſurd), produced in the remarkable cauſe of Newburgh and Burroughs (tried in Ireland about ten years ſince) this notable argument. A witneſs to the will then in queſtion ſwore on the trial to alterations made without the teſtator's knowledge. It was inſiſted, that if the jury believed him, it was not the teſtator's will, and if they did not believe him, he was not a credible witneſs, and the will therefore void for want of three credible witneſſes, a mode of reaſoning ſo comical, that none but the bye-ſtanders could have thought the framer ſerious. Yet I have ſince known jurymen of great ability, in a very celebrated cauſe, caught in the ſame trap.

the poſitive capacity of the witneſſes, their rank or quality, their condition of citizenſhip, freedom and puberty 25).

MODE OF ATTESTATION]. I ſhall begin by taking notice of two regulations peculiar to the civil law; the one, that the witneſſes ſhould be ſpecially required by the teſtator to witneſs the will; the other, that the whole perfection of the will ſhould be done *uno contextu*.

The firſt rule requires no explanation, and is a circumſtance which, amongſt us alſo, muſt always be of weight, as ſhewing more particularly the ſolemn deliberate intention of the teſtator, but which is not of indiſpenſible neceſſity (26). The latter rule means that no foreign act ſhould intervene; and this principle of *uno contextu* was carried ſo far, that wills were frequently ſet aſide for the moſt immaterial variation from it; for inſtance, for the teſtator's retiring from the room for the ſhorteſt interval, until Juſtinian provided, that ſuch ſhort accidental intervals occaſioned by the momentary abſence of him, or of one of the witneſſes, before

(25) If there was no other inſtance to prove the great utility, even in our common law courts of a ſuperior knowledge of the civil law, and of its technical Latin, this miſtake of Chief Juſtice Lee, and its correction by Lord Mansfield, would be conſpicuous.

(26) The ſtupid ſilence of the teſtator, while another in his preſence required the witneſſes to atteſt, might be a ſtrong ground of ſuſpicion; but mere ſilence, where ſanity undoubted, would be conſtrued ſimple acquieſcence.

the act completed, ſhould not invalidate the will. C. 6. 23. 27.

The next requiſite was, that the witneſſes ſhould be all aſſembled together, and that they ſhould ſubſcribe in the ſight of the teſtator, and ſee him ſign, and hear him acknowledge and publiſh the ſame: and all the witneſſes ought to ſign at the ſame time, and in the ſame place, and in the ſight of each other. Code 6. 23. 28. Ayliffe, 355. Wood, 124. Halifax, 34. (27).

(27) The vaſt variety of caſes which have been determined in our courts upon theſe points, as to wills of real eſtate, it does not come within my province as commenting upon civil law to delineate. Suffice it to obſerve, that the witneſſes muſt, by the ſtatute, ſign in the preſence of the teſtator, and muſt ſee him ſign or acknowledge his ſigning; but this they may do at different times, and therefore need not ſee each other ſign, as appears from the caſe of Jones and Lake, 2 Atkyns, 176.

N. B. When I have ſaid that by the ſtatute of frauds the teſtator muſt ſign in the preſence of the witneſſes, I ſpeak according to what has been generally underſtood to be its meaning; for Mr. Douglas truly obſerves, that this moſt careleſsly penned ſtatute does not ſay he ſhall do ſo, though it obliges the witneſſes to ſubſcribe in his preſence, and e contra, when regulating revocations of wills, it omits to direct the ſubſcription of witneſſes in his preſence, but expreſsly preſcribes his ſigning in theirs. The ſtatute is ſaid to have been injudiciouſly put together from ſome looſe notes of Lord Hale after his deceaſe, and not by himſelf, as vulgarly imagined.

Query, May not, however, the direction to ſign in their preſence have been purpoſely omitted, to enable him to ac-

The laſt requiſite was ſealing, a mode of authentication which ſeems to have anteceded the cuſtom of ſigning; and was, as Sir William Blackſtone has obſerved, in the civil law, the evidence of truth, and required, on the part of the witneſſes at leaſt, at the atteſtation of every teſtament (28), but was not neceſſary that the ſeals ſhould be their own, except in the caſe of a notary. Nov. 73. ch. 5 and 6.

SOLEMN NUNCUPATIVE WILLS]. What I have hitherto ſaid hath related to ſolemn written wills; but there is no material difference in ſolemn nuncupative ones, in reſpect of the ſolemnities, ex-

knowledge a previous ſignature? Three ſignings, one in the preſence of each witneſs, will not do. 1 Veſey, jun. 16.

The witneſſes to a will, ſays Lord Mansfield, 1 Burr. 421. need not know the contents, need not be together, need not ſee the teſtator ſign it; it is ſufficient if he acknowledges his ſignature; he may deliver it as a deed. The laſt poſition determines that publication of it, as his will is not neceſſary; a point much diſputed in Wallis and Wallis, and Trimmer and Jackſon, in the beginning of the preſent reign. But to enable any one of the witneſſes ſingly to prove the will, he muſt be able to ſhew that the others ſigned in teſtator's preſence, and therefore muſt have ſeen them ſign himſelf. See Longford and Eyre, 1 P. Wms. 174.

(28) See 2 Black. Com. p. 305. where the learned commentator obſerves on the antiquity of this ſolemnity among the Perſians and Jews, &c. &c.

It is obſervable, though among us ſealing from the Norman æra was always required to a deed, yet ſigning was not, until the ſtatute of frauds. Ibid.

cept what neceſſarily aroſe from their not being written; that is, as they were not neceſſarily at any time to be reduced to writing (29), ſubſcription and ſealing of courſe did not apply to them: but ſeven witneſſes were required, able to give clear and undoubted teſtimony of their having been preſent, and having heard the teſtator declare his will and nominate his heirs.

Before I diſmiſs the ſubject of ſolemnities, I cannot omit to inſert the judgment of Lord Mansfield upon their validity in general. He held, that courts of juſtice ought rather to lean againſt than in ſupport of theſe rigid formalities; and declared his opinion in the above-mentioned cauſe of Windham and Chetwind, that more fair wills had been deſtroyed for want of obſerving the reſtrictions

(29) With us, nuncupative wills muſt be reduced to writing within ſix days after the making; otherwiſe, after the expiration of ſix months, no teſtimony can be received to prove them: and if the eſtate bequeathed exceed thirty pounds, there muſt be three witneſſes, requeſted by the teſtator to witneſs the ſame, and it muſt be in his laſt ſickneſs, and in his dwelling-houſe, or at leaſt where he has been reſident ten days before the making, except he were taken ſick while from home, and died before his return *, otherwiſe the will is invalid. By way of further caution, probate cannot be granted of any nuncupative will till fourteen days after teſtator's deceaſe, nor without citing

* I take the words of the ſtatute; but ſurely a man *dying before his return* is a legiſlative blunder, and Mr. B. very probably ſays, dies *without* returning.

fixed by the ſtatute of frauds, than fraudulent wills obſtructed by its caution: adding, that in all his experience at the court of delegates, he had never known a fraudulent will, which was not legally atteſted. To this Lord Camden anſwers, that he has no doubt many fraudulent wills have been made ſince the ſtatute, and all formally executed. But who can tell me, ſays he, how many have been prevented? The deſign of the ſtatute was to prevent wills that ought not to be made, and it always operates ſilently by inteſtacy. If a law is to be ſlighted, becauſe it doth not entirely eradicate miſchief, no law can eſcape cenſure. Such were the oppoſite ſentiments of theſe two great and eminent judges.

UNSOLEMN PRIVILEGED WILLS.]—The ſtrictneſs which we have juſt ceaſed to deſcribe was diſpenſed with by the Romans in numerous caſes. The officious teſtament of a father beſtowing his property on his children, and all in his own handwriting; the dignified will acknowledged before the prince, honoured by his preſence, and receiving his imperial ſanction; the rude bequeſt of the ignorant ruſtic; and the haſty teſtament of the victim to general contagion; might be unſolemn, and were privileged and exempt from the neceſſity of the uſual formalities (30). In ſome of theſe

either the widow or next of kin. 7 Will. III. ch. 12. in Ireland; 29 Charles II. ch. 3. in England.

(30) See for all theſe, the ſixth book of the Code, tit. 23.

caſes five witneſſes were ſufficient, in others more were required; the literate might ſubſcribe for the unlearned, and the cotemporaneous preſence of the whole number was diſpenſed with: but above all, the military teſtament of the gallant but unlettered and endangered (31) ſoldier, claimed peculiar immunities for honourable ſervice and perilous exertion; he might write it in his blood upon his ſhield, or inſcribe it in the duſt with his ſword (32); he might dictate it to his comrades in the hour of danger, and depend upon the ſurvivor to tranſmit it to his country. No certain number of witneſſes, nor even any formal witneſs whatſoever, were required to his teſtament, if his intention could be proved to have been expreſſed either by word or writing; no ſpecial requiſition to the witneſſes, no ſubſcription or ſealing on their part, no ſpecific poſitive quality in them (for even women and aliens could be witneſſes to the ſoldier's will), were demanded by the law. Nor were his privileges confined to the manner of the teſtament; in the matter he had ſpecial exemptions. He might die partly teſtate, partly inteſtate (33): though

(31) The ſtatute of frauds excepts from its regulations reſpecting wills, whether written or nuncupative, ſoldiers in actual and military ſervice, and mariners or ſeamen being at ſea.

(32) Code, b. 21. 15.

(33) He was not ſubject, ſays Wood, to the ſubtilty of the fiction, that the teſtator could not be repreſented in part.

ſtill under paternal power, he might diſpoſe by will of property acquired by military ſervice. He might die with more wills than one: his will could not be inofficious, i. e. his children might be paſſed by, without expreſs excluſion by name: but theſe honourable diſtinctions were not attached to the name of ſoldier; he muſt be in actual ſervice and in preſent danger; and though the teſtament thus haſtily made, and from neceſſity, was valid even if he was diſbanded, for one year next following ſuch his diſmiſſal; yet his departure from the army muſt have been attended with honour, and diſgrace was followed by deprivation of privilege. Such and ſo great was the attention paid by this military nation to the protectors of the ſtate abroad (34).

CODICILS.]—A codicil (35) in the Roman law meant not, as with us, an appendage to the will; it meant a laſt will ſtanding by itſelf, and not annexed to any thing preceding, yet not ac-

(34) The canoniſts, ſays Lord Chief Juſtice Gilbert, have expounded wills of perſonalty, like the *teſtamenta militaria*, according to the intent. Treatiſe of Equity, 2 vol. p. 329. on which Mr. Fonbl. remarks, it might be inferred from hence, that the *teſtamentum militare* was the only will which by the civil law was conſtrued according to the intent, which is not true; for though the *teſtamentum militare* was one of the privileged deſcriptions of wills, its privileges were merely diſpenſations with certain ſolemnities eſſential to the validity of other wills.

(35) Upon this ſubject conſult Inſt. lib. 2. tit. 25.

knowledged to be a teſtament *for want of the appointment of an heir;* it was therefore defined an unſolemn laſt will, in which no heir or executor is named, and might be either written or nuncupative. The maker of a codicil, or codicils (for he might make more than one), might die either teſtate or inteſtate. In the firſt caſe, that is, if he had alſo made a teſtament, it did not affect the codicil: that remained valid, even though it preceded the teſtament, and was not confirmed or mentioned by it, provided it was not actually revoked or contradicted thereby; in the latter the codicil was a direction to the heir by deſcent, who acted like an *adminiſtrator cum teſtamento annexo.*

The Inſt. 25. 3. ſays, that codicils required no ſolemnity. They muſt mean, ſays Harris, no *extraordinary* ſolemnity, for five witneſſes were required, the number neceſſary upon ſeveral other occaſions (36); but the five witneſſes might be accidentally preſent and not required thereto, and they might even be of the female ſex.

Though in a codicil an heir could not be inſtituted directly, yet an heir already inſtituted by teſtament, might by codicil be declared a bare truſtee; but teſtamentary heirs could not be diſinherited by codicil, nor made conditional, if before abſolute; and a plurality of codicils, though not of teſtaments, was allowed, becauſe it was eſſential to a teſtament that it ſhould convey away

(36) Code, b. 36. c. 8. and 4. t. 20. c. 18.

the whole inheritance, otherwiſe the heir would not ſtand completely in the place of the anceſtor, whereas codicils only convey ſeveral particular legacies.

In the 25th chapter of the ſecond book of the Inſtitutes, a curious account is given of the origin of codicils, occaſioned by the difficulty on a journey, a voyage, or an embaſſy, of finding ſeven witneſſes, all Roman citizens. Their æra was that of Auguſtus—their introducer Lucius Lentulus, and the emperor conſulted the learned Trebatius (37) upon their validity.

Having now done with the different kinds of teſtaments, and the form and manner of making them, I ſhall treat of the remainder of the ſubject under the following heads.

I. WHO COULD MAKE WILLS.

II. OF WHAT THEY COULD BE MADE.

III. OF THE INSTITUTION OF THE HEIR, HIS RIGHTS AND DUTIES.

IV. OF THE QUASI HÆRES OR EXECUTOR.

(37) *Docte Trebati.* Hor. If we might judge from this caution and attention to the laws in Octavius Cæſar, we ſhould not be inclined to join in the ſevere cenſure paſſed on him by Sir W. Jones, who ſays, "when that baſe diſſem-"bler and cool-blooded aſſaſſin C. Octavius gave law to "millions of honeſter, wiſer, and braver men than himſelf, "by the help of a profligate army, and an abandoned "ſenate."

V. OF THE INTERPRETATION OF WILLS, AND CONSTRUCTION OF LEGACIES.

VI. HOW WILLS MIGHT BE AVOIDED.

VII. OF PROVING THE WILL.

VIII. OF THE BONORUM POSSESSIO AND ADMINISTRATION.

IX. OF THE COLLATIO BONORUM.

First, WHO COULD OR COULD NOT MAKE A TESTAMENT.]—Every person had full power and (38) liberty to make a will that was not under some special prohibition by law; the persons prohibited were, however, minors, persons under the paternal power, the insane, the deaf and dumb, the blind, the prodigal, the prisoner of war, aliens, and criminals; but these prohibitions must, with respect to some of them, be a little qualified. We have already qualified the restriction on the son under paternal power, by an exception for military service: we must add, that the prodigal was only forbidden, while his conduct retained him under the specific interdiction of the law from meddling with his property; and the blind might pronounce a nuncupative will, and even dictate a written one, if afterwards read to him and acknowledged by him before witnesses.

The deaf and dumb must be completely and not partially so, and must have suffered these deprivations from their birth; the alien was permit-

(38) See 2 Inst. title 12.

ted in the later times of the empire, and the criminal must have been guilty of capital crimes, such as treason, murder, or some other grievous offences, such as heresy, manifest usury, and libelling, which the civil law ranks among the most abhorred enormities (39).

The case of the prisoner of war was peculiar; if his will was made during his captivity it was invalid, notwithstanding his future liberation; but if executed antecedently to his imprisonment, it was set up by the *jus postliminii* if he returned, by the *Cornelian law* if he died a captive.

As to the case of the minor under puberty, I have only to observe, that his testament did not become valid, though he arrived at puberty before his death (40).

(39) The horror with which the Roman law considers libelling, and the severity with which it was punished, is very remarkable. If the libel charged a crime punishable with death, the author himself was capitally punished; if it affected only reputation and not life, the composer of it was incapacitated to give testimony or to make a will; and originally, by the twelve tables, *all* libels were punished with death.

(40) Nor does it with us as to lands if he dies, without the republication of it before twenty-one, 1 Siderfin, 162. T. Raymond, 84. The same is the law as to personal estate; for the rules of the civil law hold with us, as to the capacity or incapacity of minors, to make wills of personal estate. So that boys under the age of fourteen, or girls not arrived at twelve, cannot make wills of personal estate.

The rule of the civil law, with reſpect to inſanity in the teſtator, muſt agree with ours, becauſe both agree with common ſenſe. Subſequent inſanity did not validate a will made while in whole mind, nor return to reaſon that declared during the furor: a will made in a lucid interval was to be eſtabliſhed (41); and the extraordinary maxim of our law, that a man ſhall not himſelf do away an act performed during his inſanity, i. e. ſhall not ſtultify himſelf, is peculiar to our inſtitutions.

The reſtriction on the prodigal, ſo novel to our feelings, muſt have caught the attention of every reader; and its non-application under our conſtitution, has been well accounted for by a learned commentator often quoted, whoſe obſervations thereon will be found in the note beneath (42).

(41) If a lucid interval be alledged, the burthen of proof attaches on the party alledging it; if derangement be alledged, it is clearly incumbent on the party alledging it to prove ſuch derangement. See Fonb. vol. 1. p. 66.

(42) The law of England, whilſt it anxiouſly protects the intereſt of thoſe, whom the infirmities of diſeaſe or imbecility of age render incapable of protecting themſelves, reſpects the right which every individual of a free conſtitution claims, and which, indeed, the very nature of a free conſtitution ſeems to require, that of diſpoſing of his property as he thinks fit, provided he, in ſo doing, conſults the rights and claims of others; the only reſtriction preſcribed by the law of England in ſuch caſe being, "*Sic utere tuo ut "alienum non lædas.*" The civil law, however, extended its views and protection to perſons, whoſe prodigality might not only prejudice their own intereſts, but thoſe of their

It must be noted, that the interdiction of the administration of his goods did not affect a will made previous thereto.

The student will also observe, that though women were prohibited from witnessing wills, they were suffered, whether married or single, to make them (43); which seems to shew that their want of power to attend the Comitia Calata, the reason usually given for the former is not the true one, since it would equally extend to the latter privilege. Perhaps the true reason for their inability to attest, was the supposed imbecility of the sex, which prevented their being called where the choice of witnesses was voluntary.

offspring; and we find the authority of the prætor frequently interposed, to restrain the extravagance of the individual. "Solent præterea si talem hominem invenerint "qui neque tempus neque finem expensarum habet, sed bona "sua dilacerando et dissipando profundit, curatorem ei dare "exemplo furiosi; et tamdiu erunt ambo in curatione "quamdiu vel furiosus sanitatem vel ille bonos mores recepe-"perit. Ff. 27. 10. 1. furiosi vel ejus cui bonis interdictum "sit nulla voluntas est." Digest lib. 50. tit. 17. reg. 40. Fonb. Treatise of Equity, vol. 1. p. 41.

(43) With us a married woman is utterly incapable of making a will of lands, or even of chattels, excepting with the husband's consent, unless they have been given to her for her sole and separate use, or are in her possession *in auter droit*, or are the savings out of a separate maintenance; but with the assent of her husband she may make an appointment as to personalty, in the nature of a testament, which shall repel the husband from administration, and give it to her appointee.

II. WHAT THINGS COULD OR COULD NOT PASS BY WILL.]—I have already, in various places, mentioned ſome of the moſt remarkable of theſe; ſuch as the goods of the church, the property of corporations, the *fundus dotalis* and *paraphernalia* of the wife, and thoſe things which were not *in commercio*, e. g. ſuch as are called public.

Property acquired ſubſequently to the making of the will paſſed by it; if the bequeſt was univerſal, of all the property, or the thing bequeathed univerſal, as a *whole* flock of ſheep, or a herd of cattle (44); but in particular legacies, the date of the teſtament, and not the time of the death, was to be regarded. See Swinburne, part 7. ſec. 11. and Treatiſe of Equity, book 4. part 1. c. 1. ſ. 13.

It was an extraordinary proviſion of the Roman law, which enabled the teſtator to bequeath a thing not his own, the meaning of which was, that his heir was obliged to purchaſe and deliver it, or to render the value of it, if it could not be purchaſed; but if the thing was incapable of alienation, the bequeſt was void. And even if the legatee had purchaſed ſuch bequeathed property of

(44) Inſt. lib. 2. tit. 20. ſec. 18 and 19. Our law agrees as to perſonal eſtate, but differs as to real, from the principle that a deviſe of real eſtate is conſidered as a conveyance, declaring the uſes to which the land ſhall be ſubject, and therefore without republication, after purchaſed eſtate does not paſs. Salk. 238.

another, he might recover the value *ex teſtamento* (45).

A man might alſo bequeath things which did not exiſt, provided there was a poſſibility of their exiſtence; as the fruits which ſhould grow on a particular ſpot of ground, or the offspring which ſhould be born of a particular ſlave (46).

If a man bequeathed a thing which he had pledged to a creditor, the heir was under a neceſſity of redeeming it (47).

Upon the whole, then, all things were capable of being bequeathed that were *in rerum natura* exiſting, or which might ſo exiſt, whether corporeal or incorporeal, moveable or immoveable, the teſtator's own, or belonging to the heir, or to another perſon, provided they were ſuch things as lay in commerce, and might be purchaſed.

III. OF THE INSTITUTION OF THE HEIR, HIS RIGHTS AND DUTIES.]—I muſt

(45) 2 Inſt. 20. 4. Swinburne will have our law to be the ſame. Swin. 188.

(46) 2 Inſt. 20. 7. So with us, according to Swinburne, p. 18. If a man bequeathes trees or graſs growing on an eſtate, of which he was ſeized in right of his wife, his bequeſt will not paſs, becauſe he cannot bequeath the trees, which are parcel of the freehold, and deſcend with the land to the heir; but he may bequeath the corn growing thereon, becauſe that is parcel of his own goods.

(47) 2 Inſt. 20. 5. One that hath money to be paid to him on a mortgage, may demiſe this money when it comes. Godol. O. L. 391.

here recal the attention and recollection of the reader to the ſignification of the Roman heirſhip, as formerly explained in the chapter of Deſcent, and requeſt him to apply whatever was there ſaid of the natural heir, or heir by deſcent, to the inſtituted heir alſo, or heir by will. The heir was by fiction of law ſuppoſed to be the ſame perſon with the deceaſed; and all rights, duties, and actions, which were veſted in the teſtator, or to which he was liable, immediately affected the heir, not only as far as he had effects by deſcent, or property by deviſe, but as far as he had any ſubſtance in the world of his own, as well as accruing to him from the teſtator.

The conſequence of what has been ſaid was, that no man would haſtily take upon him the heirſhip, till he had well conſidered whether the eſtate was or was not more than ſufficient to pay the anceſtor's or teſtator's debts, and whether he ſhould gain or loſe by the undertaking. The perſons inſtituted heirs might be the children of the deceaſed, called *ſui hæredes & neceſſarii*, natural and neceſſary heirs; or his bondmen, called *neceſſary* only; or ſtrangers and volunteers: the bondman could not refuſe, and in return obtained his freedom of courſe. The child, by the laws of the twelve tables, could not refuſe (48), but was af-

(48) *Sui quidem hæredes ideo appellantur, quia domeſtici hæredes ſunt, & vivo quoque patre quodammodo domini exiſtimantur. Neceſſarii vero ideo dicuntur quia omnino, ſive velint, ſive nolint, tam ab inteſtato, quam ex teſtamento, ex lege*

terwards indulged, if he had not intermeddled with the effects (49), or even if he had, provided he was a minor; the ſtranger of courſe had his free option.

The method of proceeding then in later times was this (50): the law did not appoint any certain or definite time within which the heir was to take the heirſhip on himſelf, and until he did ſo, the inheritance was called *hæreditas jacens;* but the creditors of the deceaſed might convene him to declare, whether he would prove the will (51), and take the heirſhip on himſelf or not; being thus called upon to determine, a ſtated time was given him, at leaſt one hundred days, to deliberate and examine the circumſtances of the de-

12 *tabularum hæredes fiunt, ſed his prætor permittit volentibus abſtinere hæreditate, ut potius parentis quam ipſorum bona ſimiliter a creditoribus poſſideantur.* Inſt. lib. 2. tit. 19. ſec. 2.

(49) *Impuberibus liberis omnimodo abſtinere ab hæreditate poteſtas fit; puberibus autem ita, ſi ſe non immiſcuerint.* Dig. 29. tit. 2. 11. a rule ſimilar to that affecting our executor de ſon tort.

(50) Beſides the Inſtitutes, the ſtudent ſhould read on this ſubject, the whole fifth title of the 28th book of the Pandects, *de hæredibus inſtituendis*, and the ſecond title of the 29th of the ſame, *de acquirenda vel omittenda hæreditate.*

(51) As he may with us cite the executor to prove or renounce.

ceaſed, which privilege was called the *jus deliberandi* (52).

The ſituation of the inſtituted heir ſtill continued, however, to be extremely embarraſſing and perplexing: he was obliged either to accept the inheritance ſimply, or renounce it altogether. He might be miſtaken in the circumſtances of the deceaſed, and the miſtake might end in his ruin. Juſtinian was the firſt who cured theſe defects, and reduced matters to a footing of common ſenſe: he allowed the heir to make an inventory, and return it to a public officer, containing a full, true, and perfect account of the teſtator's goods; upon doing which he was anſwerable as far as the contents of the inventory, but no further.

The heir might accept the heirſhip either by expreſs words, which was called *aditio hæreditatis*, or by intermeddling, *vendendo prædia colendo, locandove*, when he was ſaid *pro hærede ſe gerere* (53). If the heir refuſed to accept the heirſhip, he could not afterwards claim it (54), at

(52) *Rector provinciæ aditus ſi hæreditate necdum ſunt obligati, eos an hæredes ſint interrogare debebit; ſi tempus ad deliberandum petierint, moderatum ſtatuet.* Code. b. 30. 9.

(53) 2 Inſt. 19. 6.

(54) With us, if one executor proves the will it ſuffices for all; and any other executor in the common law courts, after renouncing, is ſtill allowed to come in and prove; by the civil law he is not: but to prevent a claſhing of juriſdictions, the eccleſiaſtical courts in modern practice in Ire-

leaſt not after a certain period elapſed. Code, b. 31. 6. and, if he died before acceptance, the right was not tranſmitted to his heir (55).

The delicacy of the civil law in admitting perſons to the heirſhip, produced numerous exceptions to the acquiſition of this right; for want of citizenſhip, aliens; for defect of probity, apoſtates, heretics, traitors, libellers, convicts; were incapable of being heirs: women were excluded by the Voconian law, but I do not find infants among the prohibited (56). The adultreſs could not be heireſs in the teſtament of the adulterer, nor e contra; reſtraints were laid on the teſtament of ſecond nuptials (57): corporations were excluded, except latterly *through the intervention of truſtees;* and as it was cuſtomary, in order to

land, and I ſuppoſe in England, generally allow it. See the famous caſe of Downs and Houſe v. Lord Petre. Salk. 311. therefore a ſurviving executor muſt be cited again before adminiſtration can be granted to another; but *ſecus* if all the executors refuſe *at firſt*, and adminiſtration has been granted. See 3 P. Wms. 251.

(55) So if executor die before probate, unleſs he be alſo reſiduary legatee, his right is not tranſmitted to his executor, but adminiſtration granted to next of kin. Swinburne, p. 396 and 477.

(56) The ſecond huſband could not take by bequeſt a greater portion than one of the children of the firſt marriage.

(57) The gods could not be made heirs, leſt the prieſts ſhould ſhare. Ulpian Fragm. 25. 6. Heineccius Antiq. lib. 2. tit. 14.

maintain a bad title, to inſtitute the emperors themſelves, thoſe princes, with Pertinax at their head, have in various parts of the civil law nobly diſdained ſuch inſidious bounty; and Severus and Antoninus exclaim, *licet legibus ſoluti ſimus tamen legibus vivimus*, with an honeſt liberality in the concluſion of the adage, which may heal the ſtigma often thrown upon the civil law by its aſſertion in the commencement (58).

If there was no objection to the capacity of the perſons, the teſtator might appoint as many heirs as he pleaſed, in equal or unequal portions; all of whom made but one perſon, and were ſaid to be heirs of certain parts of the *AS*. They collectively repreſented the teſtator. The AS, which originally implied a pound weight of metal, and was at firſt only applied to money, was afterwards made by the Romans to denote an integral, or whatever conſiſted of parts or was capable of ſubdiviſion; ſo that *hæres ex aſſe*, when applied to eſtates and inheritances, muſt be underſtood of the man who ſweeps all without a diſtribution; and this way of computation is conſtantly followed by the Roman writers when they conſider inheritances; and the uncia, or twelfth part of the AS, was itſelf alſo conſidered as an integral, and ſubdivided (59).

(58) With us infants may be executors, but an adminiſtrator muſt be appointed during minority.

(59) Thus Julius Cæſar is ſaid to have left by his laſt

If any parts were wanting, or remained undiſpoſed of, ſo much was deducted or added to every heir; and if one was nominated heir of part only, the whole devolved or accrued to him, if no heir was inſtituted as to the reſt, for none but a ſoldier could die teſtate and inteſtate; and the heirs thus taking were not anſwerable one for the other to creditors, but each in proportion to his own portion or ſhare.

It was a very extraordinary proviſion of the Roman law, which ſuffered a perſon expreſsly inſtituted heir, to be ſet aſide, after the death of the teſtator, for unworthineſs; not that it can be ſuppoſed that his demerits were to be aſcertained by common report, or ſubject to the tribunal of private ſcandal. The inſtances were aſcertained by the law, and muſt be proved in a court of juſtice, and thought by the judges ſufficient in degree to juſtify the deprivation. Such were occaſioning the teſtator's death, or not proſecuting the authors of it, if of a violent kind, attempts to defame his

will, three heirs: C. Octavius was his heir *ex dodrante*, i. e. he had three-fourths of the *AS*; and L. Pinarius and Q. Pedius had the remaining quadrans, or one-fourth between them. The ſextula was one-ſixth of the uncia. Cicero mentions a woman who left Cœcina her heir ex deunce et ſemuncia, i. e. of eleven unciæ and one-half; to Fulcinius ſhe gave two ſextulæ, to Œbutius one; ſo that if ſhe died worth 1200l. of our money, the firſt would have had 115l. the ſecond 33l. 7s. 8d. the third 16l. 13s. 4d. Taylor's Elements of Civil Law.

honour and reputation, or other baſe ingratitude (60).

The inſtitution of the heir might be abſolute or conditional; an impoſſible condition was conſidered as null; if many conditions were jointly required, all muſt be complied with; if they were in the disjunctive, it was ſufficient to obey any (61). But the heir could not be inſtituted from a certain time, or to a certain time (62).

The heir was allowed to pay himſelf the ſums he had expended as heir, ſuch as funeral expences, the charge of regiſtering the will, or making the inventory; he was at liberty alſo to ſatisfy his own debt in preference, and to pay the creditor that came firſt (63); but he could not be called on to pay debts till nine days after teſtator's death (64).

(60) Do we not ſee in daily practice inſtances of ingratitude, and forgetfulneſs of the wiſhes of teſtators, which would make us almoſt wiſh this was the law of theſe countries?

(61) Inſt. lib. 2. tit. 14. ſec. 9. 10. 11.

(62) But with us an executor who is quaſi hæres, may be appointed either *from* or *until* a certain time, and adminiſtration granted in the mean time.

(63) Code, b. 30. 22.—45 and 9.

(64) Nov. 115. ch. 5. Our law agrees as to paying funeral expences, and the expence of proving the will, and the like in the firſt place. The executor or adminiſtrator is alſo allowed to pay himſelf firſt among debts of equal degree. In paying creditors the king's debts come firſt, then debts preferred by ſtatute—then debts of record—next debts by ſpecial contract—laſtly, debts by ſimple contract. The or-

The civil law may juſtly boaſt a ſuperiority to ours, in attention to natural equity, by conſidering all aſſets as what we call equitable, and making no ſuch diſtinctions as we do at law between ſimple contract and ſpecialty creditors; it did, however, make a certain diſtinction of creditors, but upon a more reaſonable diſcrimination; it diſtinguiſhed three orders of creditors, *privileged, mortgagees, ordinary*; moſt of the privileged we have mentioned; ſuch as for rent, law-charges, coſts, funeral expences. Of mortgagees we have treated, and the reaſon of their preference as to their ſpecific lien is evident. So far the *hæres* was forced to give a preference. Ordinary came in jointly, and ſhared in proportion to their debts. See Domat. book 3. tit. 1. ſec. 5. Debts of the crown were preferred to ſimple debts, where no mortgage.

Mention of the Falcidian law, and Falcidian portion perpetually occurs in the writings of the civil law, and demands explanation. The anceſtor

der of the civil law is very different, as may be ſeen above. If there be two judgments againſt teſtator, precedency or priority of time is not material; but he that firſt ſues out execution ſhall be preferred, and before execution, the executor may ſatisfy which he pleaſeth firſt. Where no judgment, commencement of a ſuit gives priority; but even after the commencement of ſuch ſuit, the executor or adminiſtrator may ſtill give a preference to other creditors of equal degree, by confeſſing a judgment to them for the real amount of their debts. 1 P. Wms. 295. And even without it, ſays Dr. Chriſtian, if the ſuit be in equity, and quotes 3 P. Wms. 401. *ſurely that authority is e contra.*

was forbidden to diſinherit his heir at law even for cauſe, beyond three-fourths of his poſſeſſions: and he could not burthen his inſtituted heir with legacies which ſhould conſume more than three-fourths of the eſtate; ſo that, at all events, the heir, whether natural or inſtituted, was ſure of one-fourth of the inheritance, in the former caſe as his natural right, in the latter as a reward for his labour and trouble (65).

IV. EXECUTORS].—It is uſually ſaid, that the executor in our law is the ſame with the inſtituted heir of the Roman law: this I conceive to be an error, for they too had their executors in the latter times of the empire perfectly diſtinct from the inſtituted heir; and, in fact, created to check and curb him. They took their origin from the frequency of teſtaments made for pious cauſes, and to charitable intents, and were appointed in caſe the heirs were negligent in the execution of wills. The right of inheritance ſtill remained veſted in the heir. The executor had only *nudum mi-*

(65) With us executors cannot claim any thing for their trouble or pains, nor truſtees, 3 P. Wms. 351. for ſo the eſtate might be loaded, and rendered of little value. This ſometimes ſeems a great hardſhip, though the acceptance of the office is voluntary, and they ſuppoſed to act out of mere friendſhip. Originally executors were undoubtedly ſuppoſed to profit conſiderably by being entitled to the undiſpoſed reſiduum, but that never was fixed, as it was by the Falcidian law; and they are now with us, if poſſible, conſtrued to be truſtees for the next of kin.

niſterium facti (66); he was merely to ſee that the will was properly executed, to him the execution was committed.

Whoever will take the trouble to peruſe the 28th ſection of the third title of the firſt book of the Code, will, I think, ſee plainly how the practice originated (67). It begins by charging heirs, deviſees, and legatees, not to infringe bequeſts given, and truſts created for the redemption of captives: it proceeds to ſay, that if the teſtator has ſpecially

(66) See Ayliffe, p. 372 and 373. This agrees with the definition of our executor given by Blackſtone. The Treatiſe of Equity very correctly ſays, the executor is *like* the hæres in the civil law, only he takes nothing to his own uſe. Book 4. part 2. c. 1. ſ. 3.

Whether a nude executor can be a witneſs to prove a will, and whether ſuch an executor, or any executor being ſworn, can afterwards renounce, were points ſtrongly controverted in Herbert *v.* Ruſſell, in the prerogative court in Ireland, Michaelmas 1799. The court determined both queſtions in the negative.

(67) Indeed, it would be extremely worth the pains of any eccleſiaſtical lawyer, or curious eccleſiaſtic, to peruſe the four firſt titles of that book, which treat *de ſumma trinitate—de ſacroſanctis eccleſiis—de epiſcopis & clericis*, and *de epiſcopali audientia.*

The difference between the Roman inſtituted heir, who always had a right to at leaſt one-fourth of teſtator's property, and the modern executor, will plainly appear, when the latter is conſidered, even as to the reſiduum, as a truſtee for the next of kin, yet they are perpetually ſpoken of as ſynonimous.

any perſon to tranſact the buſineſs of ſuch redemption of captives, that perſon *legati vel fidei commiſſi exigendi licentiam habeat; & pro ſua conſcientia votum adimpleat teſtatoris;* it continues, that if no ſuch perſon be appointed, the biſhop of the province ſhall have the like powers, *votum impleturus teſtatoris;* and concludes by ſtrictly charging all perſons connuſant of embezzled charities, to give information thereof to the governor of the province, or the biſhop of the dioceſe. Here then was a perſon independent of the heir, not intereſted in the inheritance, commiſſioned to get poſſeſſion of the bequeathed property, to execute the will of the deceaſed, and to adminiſter the property according to his wiſhes, and from hence by degrees the cuſtom crept in of appointing ſuch executors, and leaving little or nothing for the deviſee, or reſiduary legatee to do, and perhaps leaving to the inſtituted heir nothing more than the Falcidian portion (68).

In the wide ocean of the civil law we are liable to overlook many things; but I have not obſerved the name of executor expreſsly uſed in the Corpus Juris Civilis, before the time of the Emperor Manuel Comnenus, under whom I find a conſtitution with this expreſs title, *de executoribus teſtamentorum* (69): it recites, that "multi ho- "mines in extremis ſuis diſpoſitionibus *procura-*

(68) Ayliffe ſeems to be of the ſame opinion, p. 372.

(69) Conſtitutiones Imperatoriæ, p. 527.

"*tores ſive executores* eorum quæ preſcripſerunt "relinquunt, iis que *Chriſto* (dulci iſto ac ſalutari "mundo nomine) *hærede ſcripto*, rerum ſuarum "diſpenſationem atque adminiſtrationem adjun-"gunt;" and that they do this principally when they bequeath their property to the poor. Here then it appears, that even where the whole adminiſtration of the property was committed to an executor, yet it was thought neceſſary to name an heir; and where they wiſhed not for the poſſible interference of man, that to ſatisfy the regulations of the law, the ſacred name of our Saviour was introduced into the will.

The remaining part of the conſtitution is intended to prevent the law's delay upon occaſion of ſuch favoured and pious bequeſts, to enforce the duty of ſuch executors, and to give powers to the præfect of the town, and economiſt of the church, to enforce or execute the intentions of the teſtator, making a due return of their proceedings to the imperial court (70). The incapacities of executors were much the ſame with thoſe of heirs.

V. OF THE INTERPRETATION OF WILLS AND CONSTRUCTION OF LEGACIES].—Some general maxims of interpretation are too deeply rooted in human reaſon to admit diverſity in legal ſcience. That the will of the teſtator

(70) Perſons attainted of treaſon and felony and outlawry, cannot be executors with us. See Wentworth's Office of Executors, page 17.

ought, if poſſible, to prevail; that it cannot, however, operate againſt the rules of law; and that the words ought not overweigh the manifeſt intention, are poſitions univerſally adopted as juſt and reaſonable: but many caſes will occur by no means ſo obvious, and where wiſe lawgivers or interpreters may vary in opinion, without imputation on the judgment of any, e. g. Suppoſe two clauſes in a will repugnant to each other, and giving the ſame things to different perſons, which ſhall ſtand? In this caſe, by the civil law, as I conceive, the two hold it jointly or in common (71); and though in ancient times our juriſts differed, and would have given it entirely to the later deviſee, yet it is very obſervable that modern determinations have altered the principle, and coincided with the wiſdom of the imperial law (72).

It is generally in our courts conſidered as a maxim, that in caſes of doubt, or of doubtful expreſſion, the heir at law is to be favoured; a poſition which may be carried too far, and which in its unqualified extent has been diſputed by eminent men: the civil law, however, left no doubt of its partiality to the heir, of which it gives two remarkable inſtances in the Pandects, deciding in the one againſt a double or accumulative legacy; in the other, againſt the legatees's claim of a larger eſtate, where a queſtion had ariſen, whether a ſub-

(71) See Ayliffe, p. 379.

(72) 3 Atkyns, 493. Harg. Co. L. 112. 6.

to have met the approbation of that learned civilian.

Chattels.]—It is obſerved by Swinburne and others, that chattels is a word more obvious in the laws of this realm than in the civil law; but it ſeems to be ſettled that the whole of the teſtator's perſonal eſtate, and conſequently his money among the reſt, will paſs by a general bequeſt of *all his goods*, or of *all his chattels* (78).

Goods immoveable.]—Theſe words give a right to the leaſes or leaſehold intereſts which did belong to deceaſed, and to the natural fruits thereof, as graſs growing on the ground, and fruit on the trees, but not to corn growing in the ground, or any induſtrial fruits, i e. produced by men's induſtry: they are counted among the moveables (79).

Moveables.]—Under *moveables* a legatee may recover all perſonal goods, both quick and dead, which either move themſelves, as horſes, ſheep, and oxen, or can be moved by another, as plate, houſhold ſtuff, corn in the barn or in the ſheaf, and natural fruits if gathered, not *fructus pendentes*, and alſo corn growing, if it were ſown in time, before the expiration of the term, ſo that teſtator might have reaped it, if he had lived till harveſt (80).

(78) See Swinburne, part 7. ſec. 10.

(79) Swinburne, page 503.

(80) Swinburne, part 7. ſec. 10. p. 301. *Alimentum*, maintenance, comprehended food, clothing, dwelling, edu-

Upon ſeveral of the preceding words there have been conſiderable conteſts, as for inſtance, whether ready money ſhould paſs under *chattels*; but of all expreſſions, *houſehold ſtuff* ſeems to have given riſe to moſt contention. The whole tenth title of the 33d book of the Pandects is *de ſupellectile legata.* And in modern times, though no doubt can be entertained that cattle, carts, veſſels affixed to the freehold, and many other things enumerated by Swinburne (81), are not to be reckoned among houſehold ſtuff, and that apparel and books (82) are excluded by the civil law, yet great conteſts have ariſen, whether plate and coaches, or ſuch like equipages, are to be claſſed and included under the general name of houſehold ſtuff. The determinations are, that plate will paſs, if conſidered by teſtator, not as merely ornamental, but as part of his utenſils, i. e. if the teſtator was in a rank in life which rendered plate an article ſuitable to his domeſtic eſtabliſhments; and Swinburne is of opinion, that coaches and

cation, and even if the ſituation in life of the legatee demanded it, ſervants and horſes. Dig. 34. 1. *de alimentis legatis. Prædium inſtructum* paſſed every thing upon it. *Prædium cum inſtrumento*, only the things neceſſary for cultivation.

(81) It is remarkable, that upon this ſubject and ſeveral others of a ſimilar kind, the Treatiſe of Equity has borrowed from and copied Swinburne verbatim, without mentioning the loan.

(82) A library does not paſs by this name, 3 Atk. 202.

ornamental carriages are to be numbered among houſehold ſtuff.

In analyſing the interpretation of words in teſtaments, I have been inſenſibly carried into the conſtruction of legacies; for, in ſtrictneſs, it was in them only, and not in the univerſal deviſe to the heir or univerſal ſucceſſor, that ſuch queſtions could occur.

Legacies, however, or particular ſucceſſions, deſerve a ſeparate and more minute diſcuſſion, both on account of the very ſpecial and particular conſideration beſtowed upon all their various caſes by the civil law, and alſo becauſe its deciſions thereupon have generally been followed by the courts and judges of theſe realms.

The four diſtinctions of legacies known to the early Romans, and the diſcriminating lines between legacies direct, and legacies in truſt, were all done away by Juſtinian. The civilians, after diſcuſſing the caſes of *uncertainty* and *error* in legacies, conſider them as *conditional, alternative, accumulative* or *double* (83), and then proceed to the points of *abatement, ademption*, and *tranſlation*, together with the queſtion when intereſt ſhall be allowed upon them (84).

(83) Our law uſually divides them into ſpecific and pecuniary, veſted and contingent.

(84) On many of theſe points, as Mr. Woodeſen obſerves, the court of chancery has very unreſervedly referred to the rules of the Roman civil law, as principles of de-

Of Uncertainty.]—This may reſpect the legatee, or the thing bequeathed, and in the firſt inſtance may ariſe from no perſon being *named*, or from two perſons having one and the ſame name. If no perſon be named, of courſe the legacy muſt be void; and by the earlier Roman law ſuch a deſcription of a legatee as this, I give to *whoever ſhall give his daughter to my ſon in marriage*, was too uncertain to make good the legacy. But Juſtinian amended the law according to reaſon, and its ultimate regulation was, that legacies might be given to uncertain perſons, if the teſtator's meaning could be found out, or they rendered certain by the event (85).

If there were divers perſons of the ſame name, the legacy was void for uncertainty, unleſs one of them was able to prove himſelf the perſon intended, of which his being the intimate friend or near relation of the deceaſed was allowed to be ſtrong proof. But charitable legacies were not to fail from the want of certainty as to the object intended. If to a church without naming any one in particular, it would be interpreted the pariſh church of the deceaſed; if to the poor, the poor of his pariſh; but at all events, the

ciſion; and the ſame author, in another place, truly ſays, in all teſtamentary matters of a perſonal nature, our courts have availed themſelves of the wiſdom and experience of the civilians.

(85) See Inſt. lib. 2. tit. 20. ſec. 25. et deinceps.

pious aſtuteneſs of the law would prevent the failure of his good intentions (86).

Uncertainty as to the thing bequeathed muſt moſt uſually proceed, from the bequeſt being too general and not ſufficiently definite, and even neglect to expreſs the quantity was fatal by the civil law; but Swinburne obſerves, that the equity of our eccleſiaſtical law admits ſuch legacies; leaving the quantity to the diſcretion of the ordinary.

This uncertainty muſt frequently produce a queſtion of *option* or *election*. E. G. if the teſtator bequeathed a horſe, having many, who ſhould chuſe? the election belonged to the heir if the words were directed to him, as I will that my heir ſhall *give* A. B. a horſe; to the legatee, if directed to him, as I will that A. B. *ſhall have* a horſe, but in the former caſe the heir muſt not chuſe the very worſt, nor in the latter the legatee elect the very beſt (87).

(86) So with us in gifts to charitable uſes, if no ſpecific deſcription of object be pointed out, the court of chancery will, in reſpect of the general purpoſe appearing, direct the mode of giving it effect. Attorney General v. Henrick, Ambler, 712. collateral proof may be admitted to make certain the perſon or thing deſcribed. See Treatiſe of Equity, book 6. ch. 2. ſect. 6. and the caſes there cited. Covenant deſigned for the benefit of the church, if poſſible to be ſpecifically performed, 2 Eq. Ca. Ab. 17.

(87) He who ought to do the firſt act ſhall have the election, by our law. Co. L. 145. a.

Error.] This may be in the perſon, in the name, or the quality of the deviſee or legatee. If it could be proved that the teſtator meant one perſon, but by miſtake mentioned another, the legacy to the latter was void, but a wrong deſcription would not vitiate, if the perſon could be aſcertained (88). The ſame rule held as to a miſtake in the name. An error in the quality was not hurtful, unleſs that quality were the final cauſe, wherefore the teſtator gave the legacy (89). An error in the proper name of the thing did not vitiate, but in the name appellative of it did, for that was in the ſubſtance.

Conditional Legacies.] If the legacy was pure and ſimple it became due the day of the death of the teſtator, and therefore if the legatee died firſt, it lapſed and was not tranſmiſſible; but if the legacy was conditional it became due the day on which the condition was performed, and lapſed if the legatee died before that day. Theſe were the general rules (90), but there were

If a man grant one of the horſes in his ſtable, the grantee has his election to take which he pleaſes. Co. L. 145. a.

(88) See 2 Inſt. lib. 2. tit. 20. ſect. 30. *De falſa demonſtratione*, ibid ſect. 29. *De errore in nomine legatarii.* Legacy to the two daughters of A. A. has three daughters, they ſhall all take. Stebbing v. Walker, 2 Brown, p. 85. To James ſecond ſon of A. he was the third, the name prevails over the order.

(89) Ibid. ſect. 31. *De falſa cauſa adjecta.*

(90) So they are in our law, but as to the firſt a bequeſt may be ſo worded as to prevent lapſe, 3 Atkyns, 372. 380.

many exceptions and diſtinctions, among which none is better known to our law than that between time annexed to the ſubſtance and to the payment of the legacy; in the former it did lapſe, e. g. if the words were *when or if* A. B. ſhall arrive at twenty-one, (91) in the latter was tranſmitted to repreſentatives of legatee, e. g. if they were *to be paid* when A. B. ſhall be of the age of twenty-one.

The law diſtinguiſhed between a *conditional* and a *modal* legacy, *i. e.* one in which the mode or manner of applying the legacy was mentioned, as ſo much to bind a boy apprentice, or to erect a monument; in theſe caſes the legacy was veſted and due immediately, and did not lapſe by the death of the legatee, and our law agrees. Barlow v. Grant, 1 Vernon, 255. See Swinburne, p. 253.

Under conditional legacies we muſt again advert to thoſe conditioned in reſtraint of marriage. I have before ſaid, that by the civil law all conditions in reſtraint of marriage were void, as contrary to nature, and hurtful to the community, and marked the diverſity between that

and as to the latter, there are many caſes in which it is *debitum in præſenti*, though *ſolvendum in futuro*, veſted and tranſmiſſible. See them collected 2 Fonbl. p. 374.

(91) Lands deviſed in this manner will deſcend to the heir, 3 Term R. 41. All that the civil law has ſaid upon the ſubject is applicable to what we call real, as well as to perſonal eſtate. An eſtate to A. and his heirs, if A. dies before teſtator, the deviſe is void, as appears from every caſe

and our ſyſtem on the ſubject (92). I muſt be underſtood to mean, however, prohibitions of marriage altogether, for if it was only in part reſtrained, in reſpect of time, place, or perſon, the civil law agreed with ours, for this was only protecting the individual from the conſequences of haſty, raſh, and improvident matches.

Under the head of lapſed legacies, I muſt alſo again obſerve, (93) that there was no ſurvivorſhip among legatees by the civil law, but that ours differs in that reſpect (94).

Alternative Legacies.]—In this caſe there was but one legacy, as if the teſtator bequeathed his eſtate at Tivoli, *or* his eſtate at Brunduſium, the

from Brett and Rigden in Plowden, to White and White, a caſe from Ireland, not many years ſince determined by the Lords in England, where the teſtator's intentions in favour of his grandſon by his eldeſt ſon deceaſed, were forced to bend to the rules of law which gave the property to his ſecond ſon.

(92) Book 1. Chap. 1. p. 79. and Introductory Chapters, p. 31. Unreaſonable conditions in legacies were null, as to be decollated or conſumed in lime from fear of inhumation alive, were deemed ſuch. But was it not too great a latitude to annul conditions tending to quiet the departing ſoul, and founded in apprehenſions proved by experience, to be not altogether groundleſs?

(93) See note to p. 212. in the chapter on Joint-tenancy.

(94) As appears from the caſe of Northey and Burbage, Gilb. Rep. 137. and Buffar v. Bradford. 2 Atks. 210.

legatee ſhould have but one of theſe eſtates, but he had his option which he would take; if property was given to A. *or* B. they took jointly.

Accumulative Legacies.]—They might be either accumulated upon another legacy, upon a child's portion, or upon a debt due. In the firſt caſe if they were pecuniary, and given by the ſame will, the preſumption was againſt the legatee, but if the two pecuniary bequeſts were in different writings, as e. g. in a will and a codicil, whether the latter was more or leſs, or equal to the former, it was to be conſtrued accumulatively, the preſumption was in favour of the legatee (95); but if it was a ſpecific thing, a *corpus* as the civil law terms it, it could not be deviſed twice, the legacies were not held to be accumulative, for *eadem quantitas ſæpius præſtari poſſet, non vero eadem res.* But theſe rules being only applied to, where there was no internal evidence of the intention, of courſe yielded to that intention if it appeared manifeſt (96).

(95) *Cæteris paribus, a teſtator muſt be ſuppoſed to mean a benevolence.*

(96) See particularly Dig. 34. 4. 9. and alſo Dig. 22. tit. 3. de probationibus & preſumptionibus, and Swinburne, L. 50. theſe rules have been moſt clearly illuſtrated by Mr. Juſtice Aſton, and the Lord Chancellor, in Hooly and Hatton, and by Lord Thurlow, in Ridges v. Morriſon, 1 Brown, 389. who all evince their knowledge of the Roman law, and whoſe example ought to be the ſtrongeſt incitement to its ſtudy.

As to double portions, the general tenor of cafes, (and upon this ſubject the principles of the civil law cannot be better illuſtrated than by the deciſions of our courts of equity,) ſeems to have been to lean againſt them, *i. e.* that a legacy ſhould be conſtrued to be a ſatisfaction, unleſs there are circumſtances to ſhew that it was not ſo intended. To this, however, there are numerous exceptions, as when the proviſion by the will is inferior, and whether there can be any general rule, was vehemently diſputed in the caſe of Hanbury and Hanbury, 2 Brown's Rep. p. 352. where all the caſes on the ſubject are collected, and in which an eminent advocate declares he could find but two caſes, and thoſe governed by very ſpecial circumſtances, where a legacy was not conſtrued to be a ſatisfaction of a previous portion.

Where a father makes a proviſion for a child by his will, and afterwards gives to ſuch child

A larger legacy given to the ſame legatee in a will after a leſs, legatee ſhall take both. Curry v. Phill, 2 Brown, 225. ſo that the rule of the civil law ſeems only to have been followed where the legacies in the ſame writing were equal in quantity; in Coote againſt Coote, 2 Brown, 526, a ſecond codicil appearing to be only a repetition of the former, with the addition of a ſimple legacy, the legacies were not doubled; but the moſt remarkable point in that caſe was, that parol evidence was read, to ſhew they were not intended as accumulative. See p. 525. 2 Brown, for the reaſons given.

a portion in marriage, or for eſtabliſhment in life, of equal or greater amount than the legacy, it is an implied ademption of the legacy (97).

I proceed now to the third caſe, viz. of a legacy bequeathed to a creditor by his debtor. The preſumption here *prima facie* was, that the legacy was to go in ſatisfaction of the debt, for that the teſtator muſt be ſuppoſed to be juſt before he is kind, and the maxim of the civil law was *debitor non preſumitur donare.* But this preſumption was carried too far, and if the legacy be leſs than the debt, or on condition, or on a contingency, or not equally beneficial with the debt in any particular, it has not been conſtrued to go in ſatisfaction, but accumulatively. So if the thing were of a different nature, thus land was not to go in ſatisfaction of money (98).

(97) See the exceptions to this rule collected by Mr. Fonbl. 2 vol. p. 554. How far a wife ſhall have both a legacy and a proviſion, covenanted at the time of marriage, ſee Babbington v. Greenwood, 1 P. Wms. 531. Eaſtwood and Vinke, 2 P. Wms. Richardſon v. Elphinſtone, 2 Veſey, jun.

(98) Inſt. 2 Lib. Theſe principles are found among other places of the ſecond book of the Inſtitutes, lib. 20. ſect. 14. which is *de debito legato creditori.* Though our courts of equity have followed them, yet where the teſtator has left wherewithal, and ſhewed his intentions ſo to be, he has been conſtrued to be both juſt and bountiful. See Salk. 155. Cuthbert v. Peacock, and Chancey's caſe, 1 P. Wms. 408.

The points of abatement and intereſt may be very briefly diſcuſſed; as to the firſt, the heir, whenever he paid legacies, might demand caution from the legatees that they would refund, if there were a deficiency of aſſets (99), Ayliffe, p. 377, but charitable bequeſts were not to abate in proportion with the reſt, Nov. 131. ch. 12. and as to intereſt, the rule is thus briefly laid down in the Pandects, 30. 1. 23. *ſi quis bonorum partem legaverit ſine fructibus reſtituitur, niſi mora interceſſerit hæredis.* The heir was not accountable for the fruits, unleſs he had been in delay, if, for inſtance, he refuſed to pay becauſe they objected

A legacy cannot be counted a ſatisfaction of a debt contracted after the will made, 1 P. Wms. 299.

So if the debt was upon an open or running account, ibid.

Legacies naturally imply a bounty, and therefore in Clark v. Sewell, 3 Atks. 97. the maxim, *debitor non præſumitur donare*, would not hold, ſaid Lord Hardwicke, if it were now to be reconſidered.

The courts of late have not altogether diſavowed this doctrine of ſatisfaction, yet they have been very inclinable to lay hold of any circumſtances to diſtinguiſh the latter from the former caſes. 2 Veſey, 636.

Any minute circumſtance is laid hold of to evade the rule of a legacy larger or equal to a debt, being a conſtructive ſatisfaction.

(99) With us pecuniary legatees abate in proportion, but not ſpecific legatees. Charitable legacies abate equally with others.

to his retaining the Falcidian portion, he paid not intereſt, for the delay was not his (100).

Ademption.]—This might ariſe from the deſtruction of the thing bequeathed, from calling it in if it was a debt due to the teſtator, or from the improper conduct of the legatee. If the thing bequeathed periſhed before delivery without the fault of the heir, the loſs fell upon the legatee (101); ſo if it be changed, as if the teſtator pulled down the houſe bequeathed, and built another, the bequeſt did not extend to the new edifice (102). If the teſtator in his life-time alienated, or gave the thing to another, the legacy was extinguiſhed of courſe (103); but if the alienation was not voluntary, but conſtrained by temporary poverty, or ſome ſuch cauſes, many civilians have inſiſted, that either the legacy was not extinguiſhed, or at leaſt the proof of altered intention was thrown on the heir (104).

(100) If a legacy be charged on land, and no time of payment mentioned in the will, it carries intereſt from teſtator's death; ſo if upon productive perſonal eſtate as out of mortgages, or ſtock yielding intereſt or profit; *cauſa patet*. But if it be to come generally out of the perſonal eſtate, and no time of payment mentioned, it ſhall carry intereſt only from the end of the year after the teſtator's death.

(101) Inſt. lib. 2. tit. 20. ſec. 16. *de interitu & mutatione rei legatæ.*

(102) Dig. 30. b. 5. ſec. 2.

(103) Dig. 34. 4. 18.

(104) Dig. 32. 11. 12.

The calling in a debt due, was conſidered as an ademption, the receiving it as voluntary payment not ſo (105); yet even the former rule is by no means ſatisfactory, as he might have called it in, merely from apprehenſion of the ſecurity (106), and ademption of legacies is not to be preſumed.

Other cauſes of ademption were peculiar to the Roman law, as if the legatee had grievouſly injured or wounded the teſtator, or great enmities had ſubſiſted between them; rules opening a licenſe for controverſy and difficulties in proof and practice, wiſely avoided by our law, for who ſhould determine the gradations of ill-will which ſhould or ſhould not be conſtrued to extinguiſh the legacy (107)?

Before I quit the ſubject of legacies, I muſt remind the reader of what was ſaid in the Chapters on Jointenancy, that by the civil law there

(105) Dig. 32. 11. 13.

(106) That diſtinction has been exploded with us, but another is made between a ſpecific legacy and one *in numeratis*, viz. that the former is loſt by being altered, not the latter. See Treatiſe of Equity, book 4. part 1. c. 2. ſ. 2. and the caſes mentioned in the note.

(107) Pandects, lib. 34. tit. 3. ſ. 11. *Si quidem capitales vel graviſſimæ inimicitiæ interceſſerint, ademptum videtur quod relictum eſt; ſin autem levis offenſa, manet fidei commiſſum.* I muſt here obſerve, that ſimple legacies, and legacies or bequeſts in truſt, are generally conſidered together in the Digeſts. The 30, 31, and 32 books of the Digeſts are entitled, alſo the 1, 2, and 3, *de legatis & fidei commiſſis*, and treat entirely of them.

was no ſurvivorſhip among legatees, a rule followed by our eccleſiaſtical courts, and ſtrongly urged in the court of chancery, but by the latter tribunal repelled (108).

After legacies, the Inſtitutes treat of truſts and ſubſtitutions; the latter have been explained in the chapter of Remainders, and what is ſaid on the former ſeems little intereſting to the modern advocate. Theſe chapters of the Inſtitutes treat principally of laying equal burthens on the heir, and the perſon for whom he held in truſt, when ſuch a truſt was created, becauſe originally the heir felt the whole burthen in ſuch caſes without any benefit, and thereby the legatee, or ceſtuyque truſt (if we may call him ſo) ſuffered, becauſe the heir would not accept the inheritance, and thereby the legacy or truſt ſunk alſo. To remedy this, proviſions were made, that if the heir was a mere inſtrument of transfer to the ceſtuyque truſt, and derived no benefit, he ſhould not be ſubject to debts, or feel any burthen: or

(108) Webſter and Webſter, and Cary and Willis, 2 P. Wms. are caſes in which it was controverted, whether a legacy being given to ſeveral perſons, they ſhould be jointenants, according to the rule of the common law, or tenants in common, according to the rule of the civil, and that of the eccleſiaſtical courts, which admit of no ſurvivorſhip; determined in favour of jointenancy, and in the latter caſe, as I have before obſerved, the maſter of the rolls ſays, that he does not ſee that a court of equity ſhould, even in caſe of a legacy, judge according to the rules of the civil law.

at leaſt as he retained his Falcidian portion againſt the ceſtuyque truſt, as well as againſt legatees, that the debts ſhould be divided proportionably between them (109).

VI. HOW WILLS MIGHT BE AVOIDED.] —They might be rendered null and void by *cancellation—expreſs revocation—a later teſtament—implication—inofficiouſneſs—imperfection*, or by ſhewing that they were unduly *obtained*, to which we muſt add *adoption*, and the *capitis diminutio*. *Cancellation* or obliteration deliberately done muſt be allowed ſufficient to avoid a will, but as it might happen by accident, and is *prima facie* an ambiguous act, in order to make it a revocation, it ſhould be ſhewn if poſſible, *qua animo* it was cancelled; and if there be a controverſy, who did it, it will be preſumed to be done by him in whoſe cuſtody it was (110). *Quæ in teſtamento legi poſſunt, ea inconſulto deleta,*

(109) It muſt be obſerved, that though the *fidei commiſſa* of the Romans are perpetually compared to our truſts, the reſemblance is very remote. The heir took the eſtate on truſt to hand it over to another, the latter then had an inchoate right or claim, but no actual eſtate; thoſe were not two contemporaneous eſtates, one legal and the other equitable, one in the truſtee, the other in the ceſtuyq. truſt. The fidei commiſſary, therefore, though called ceſtuyq. truſt, as a ſound familiar to our ears, is not called ſo in our ſenſe of the words, nor can we learn much from their doctrine of truſts.

(110) One of the moſt remarkable caſes upon cancellation in modern times is reported in Cowper, p. 49.

nihilominus valent; conſulto, non valent, ſay the Pandects, 28. 4. 1.

Expreſs revocations either of legacies or of previleged teſtaments might, by the civil law, be ſimple, naked, or even verbal. Thus, teſtaments *ad pias cauſas*, and military teſtaments might be revoked, but ſolemn teſtaments were to be ſolemnly revoked (111). Wood ſays generally, that verbal revocations were not valid, but his authority, viz. Inſt. 2. 17. 7. does not ſupport him, relating only to the emperor.

Burtenſhaw v. Gilbert, in which, among other points, it was determined that the act of cancelling a latter will doth not ſet up a duplicate of the former, and that where there are duplicates of a will, one in the teſtator's cuſtody, the other not, and the teſtator cancels that which is in his cuſtody, it is an effectual cancelling of both.

(111) See Swinburne, p. 531. The ſtatute of frauds enacts, that no demiſe in writing of *lands*, *tenements*, or *hereditaments*, or any clauſe thereof, ſhall be revocable, otherwiſe than by ſome other will or codicil in writing, or other writing declaring the ſame; or by burning, cancelling, tearing or obliterating the ſame by the teſtator himſelf, or in his preſence and by his directions and conſent; but all demiſes and bequeſts of lands and tenements ſhall remain and continue in force, until the ſame be burnt, cancelled, torn, or obliterated by the teſtator, or by his direction in manner aforeſaid, or unleſs the ſame be altered by ſome other will or codicil in writing, or other writing of the deviſor, ſigned in the preſence of three or four witneſſes declaring the ſame. Sec. 6.

And no will in writing *concerning any goods or chattles or perſonal eſtate* ſhall be repealed, nor ſhall any clauſe,

Later teſtaments to revoke thoſe antecedent, muſt be perfect in every reſpect. *Tabulæ priores jure factæ, non irritæ fiunt*, ſay the Inſtitutes, 2 book, title 17. ſ. 7. *Niſi ſequentes jure ordinatæ perfectæ fuerint.* See alſo Code, b. 23. 21. 3. Nor was the inſtance given in the ſame title of a ſecond teſtament invalid by the non-acceptance of the heir, revoking a former and occaſioning the *pater familias* to die inteſtate, ſec. 2. an exception to the rule, becauſe there the ſecond teſtament was perfect in itſelf, though rendered invalid by matter ex poſt facto (112).

deviſe or bequeſt therein be altered or changed, by any words, or by word of mouth only, except the ſame be in the life of the teſtator committed to writing, and after the writing thereof, read unto the teſtator and allowed by him, and proved ſo to be done by three witneſſes at the leaſt.

(112) Our law agrees. See Onions and Tryer, 1 P. Wms. 343. But a difference of ſolemnities is preſcribed where a will is to operate ſubſtantively, and where it is merely to revoke a former.

It is ſaid alſo, that it muſt be a ſubſiſting will at teſtator's death, 4 Burr. 2512. unleſs the ſecond will expreſsly revoke the firſt, which was the caſe of Burtenſhaw and Gilbert, mentioned before. The republication of a will once reverſed with us muſt be attended with the ſame ſolemnities as the original making.

The ſtatute of frauds does not extend to implied revocations, and it is agreed, that an alteration of circumſtances may operate as a revocation of a will of lands, as well as of perſonal eſtate. See 1 Abr. Caſ. Eq. 413. Where the whole eſtate is diſpoſed of, ſubſequent marriage and the birth of a child form a preſumptive revocation, liable how-

Implied revocations were familiar to the Roman law, thus the birth of children operated as a revocation of a precedent will. See Inſt. 2 lib. tit. 13. ſec. 1.

Imperfect teſtaments might be ſo in reſpect of ſolemnity, or reſpect of will. Of the former we have treated (113). Imperfection in reſpect

ever to be rebutted by evidence. See Brady and Cubit, Douglas p. 31. Lord Northington and Dr. Hay were of opinion, that marriage ſingly would not revoke a will of *perſonality*, for in real eſtate the queſtion does not occur. Mr. Fonblanque has advanced a contrary opinion, admitting, however, that the preſumption is liable to be encountered by every circumſtance indicative of a contrary intention. Treat. of Eq. 2 vol. page 360. In a very ſtrong caſe marriage was held to be a revocation of the will of a woman. Hodſden and Lloyd. 2 Brown's Ch. 534.

Another great point in diſpute has been, whether the birth of a child ſimply, ſhall operate as a revocation. Dr. Hay, in the remarkable caſe of Shepherd and Shepherd, held it did not, and the Roman rule being referred to, and it being inſiſted that the Roman law in general guides the decrees of the eccleſiaſtical courts, (he anſwers) no further than it ſtands uncontradicted by the Engliſh. But Mr. Fonblanque inſiſts, that it is not ſo contradicted, and that our rule is the ſame; and in anſwer to the obſervation, that children are not with us conſidered as having a property in the effects of their father as they were at Rome, replies, though not an indefeaſible property or legal right to any part, yet they have a natural and moral claim.

(113) No want of ſolemnities affects a will of perſonal eſtate with us. The moſt ragged and dirty papers, I may ſay fragments, in teſtator's hand writing, or even dictated,

to will might be either when the teſtator was prevented from finiſhing his teſtament by death or other impediment, or having voluntarily deferred its completion, death intervenes, and there is no queſtion that by the civil law it was void in ſuch caſes, even as to the part already done (114), though it were the teſtament even of the father among his children (115).

The rigour of the civil law adopted the ſame rule, where the teſtator himſelf deferred the finiſhing his teſtament and died, or was otherwiſe prevented from giving it perfection.

But if the teſtator having declared his whole will for the preſent, reſerved ſomething to be done at another time, and in the mean time died (116), the teſtament was perfect notwithſtanding.

and not regularly witneſſed, where no ſuſpicion of fraud, and they could be put together ſo as to collect the ſenſe, and there appeared no imperfection of will, have been eſtabliſhed as teſtamentary diſpoſitions, at leaſt ſo far as to be directions to the adminiſtrator who was obliged to act with them, as *cum teſtamento annexo*.

(114) Swinburne makes a great queſtion, whether it be void *jure gentium*, and therefore by the law which we uſe in England; and makes that depend on another queſtion, viz. whether a teſtament *ad pias cauſas*, which is alſo governed *jure gentium*, be in ſuch caſes void or not, as to what is already done, and is of opinion that it is not.

(115) Swinburne, part 7. p. 519.

(116) Swinburne, ibid. And Swinburne inſiſts, that in both caſes our law eſtabliſhes what has been done; *it*

As to wills unduly obtained. The variety of fraud and influence which might be uſed for this purpoſe is not reducible to limitation or deſcription, and is on every account the ſubject of pictures too melancholy to arreſt the diſguſted eye, longer than they force themſelves upon it. It is one of the great themes of the Roman ſatiriſts, and too often the ſubject of horror in the countries in which we dwell (117).

muſt be underſtood as to perſonalty ſince the ſtatute of frauds, and that the clauſes in the part done are perfect. But if the teſtator declares that he means to make alterations in the part already made, and dies without making them, the will, though of perſonalty, ought not to be eſtabliſhed, for no man can tell where he meant to alter, and it is not his will.

If a paper writing of a teſtamentary nature *as to perſonalty* be found, whether it ſhall be a draught only or a teſtament, muſt depend on a variety of circumſtances, for which I muſt refer the reader to Swinburne, part 7. ſec. 13.

The 22d and 23d title of the 6th book of the Code *de teſtamentis*, ſhould be diligently peruſed by the ſtudent.

(117) The limits of undue influence, and the lines between it and laudable attention, are too nice for general rules, and in every caſe muſt depend upon its circumſtances. Some caſes are too ſtrongly marked to admit of doubt, as where the bounty of the teſtator has been diverted by groſs miſrepreſentation, or his relenting mind not ſuffered to feel the whole determining effect of the ſupplications of a child. But the poſitions of Swinburne, as to flattery and importunity, if admitted to be law in the wide extent laid down by him, would make wild work indeed. In general, in ſuch caſes, as I have been told by learned civilians in

Inofficious Wills.]—It is now generally known that by the civil law, a will was void, if children in *the power of the father*, were therein paſſed over in ſilence or diſinherited without cauſe; and that a ſilly and falſe opinion has prevailed among the ignorant, that our law had adopted the rule; which gave riſe to the cuſtom of leaving a ſhilling to a diſinherited child. The civil law had its peculiar reaſons, which I have often mentioned, viz. that the child *was conſidered as one and the ſame perſon with the father, as having a property in his effects, and therefore prima facie entitled to continue the management of his own eſtate.* But if he was mentioned in the will, and the cauſe expreſſed, he might be diſinherited, provided it was one of the cauſes allowed by the law. Among theſe were ſtriking or curſing, killing or endeavouring to kill the parents, accuſing them of capital crimes, and even refuſing to be ſecurity for them. Hereſy in the ſon was a ſufficient cauſe—nay, his diſgracing himſelf, as by going on the ſtage, with many others to be judged of by the magiſtrate; but the privileged will of a ſoldier could not be inofficious.

Adoption and change of ſtate.]—A will at Rome was alſo void, if the teſtator ſuffered a diminution of his liberty, or of the rights of the city by way of puniſhment, or was condemned to death (118);

England, the diſpoſition of their courts, is *cæteris paribus*, to lean in favour of the will.

(118) Dig. 28. 1. 8. 1. For the three kinds of *capitis diminutio*, ſee book 1. p. 55. above.

and alſo by the agnation of an heir, when a perſon had by arrogation adopted a ſon (119). Theſe proviſions, peculiar to the Roman law, do not merit to be dwelt upon by us.

VII. PROBATE OF WILLS.]—The publication or probate of the will, was to be made before a competent judge, and at Rome this judge was the *Magiſter cenſus*. The biſhops endeavoured to intermeddle with this power, founding their claims, on their being the legal overſeers (as they were) of the adminiſtration and fulfilling of pious and charitable bequeſts. Juſtinian interfered and forbade eccleſiaſtical juriſdictions to meddle with teſtamentary cauſes. In later times of the empire, however, they appear to have claimed this authority with ſucceſs (120).

The mode of authentication was by inrolling it in a public regiſtry (121), (after it had been opened in a ſolemn manner), reſembling our prac-

(119) Inſt. 2. 17. 1.

(120) That the county courts formerly had juriſdiction of wills,—the ſeparation of the biſhops and ſheriffs courts in the reign of William the Conqueror,—and the ſpiritual courts gradually drawing to themſelves the cognizance of wills, (until in the reign of Henry II. they appear to have got it excluſively) are hiſtorical facts, univerſally known to men of the legal profeſſion.

(121) *Teſtamenta omnia cæteraque quæ apud officium cenſuale publicari ſolent, in eodem loco reſerventur, nec unquam permittatur fieri ulla tranſlatio.* Code 6. tit. 23. ſec. 18.

tice of enrolling deeds in a court of record (122), and then, though the original was loſt, credit was given to the regiſtered copy (123); thus the Code 6. book 23. title *de teſtamentis*, ſec. 2. ſays, *Publicati ſemel teſtamenti, in qua primum a teſtatore ſcriptum relictum fuit caſu qui probatur intercidit; nihilhominus valet.*

VIII. BONORUM POSSESSIO.]—The four firſt titles of the thirty-ſeventh book of the

(122) Probate with us is in common form, by taking an oath, where no queſtion is raiſed upon the will, and this ſhould not be adminiſtered till fourteen days after teſtator's deceaſe, to give time for objection, if there be any, or if a caveat be entered.

Probate in ſpecial form is by examining the witneſſes to the will, or other ſufficient proof, where oppoſition is given to its eſtabliſhment.

(123) With us, as every perſon knows, the original is depoſited: the probate or authenticated copy with the ſeal and authority of the court is given out. And though the probate is of no avail as to real eſtate, yet as wills for the moſt part conſiſt of mixed bequeſts and deviſes of real and perſonal eſtate, they are generally proved in the ſpiritual courts.

I cannot but lament here, a circumſtance I believe not generally known, that the great depoſitory of wills in this kingdom, thoſe moſt important miniments of property, is at preſent in no manner protected from fire, but on the contrary in a moſt remarkable manner expoſed to it, from the conſtruction of the building, and nature of its vicinity, a circumſtance by none more lamented than the conſervator of them: it ought to be an iſolated and ſpecially conſtructed edifice.

Digeſts or Pandects treat *de bonorum poſſeſſionibus* (124). This poſſeſſion of the goods was

(124) It has been often ſaid that the adminiſtration, granted by the ordinary, is not unlike the bonorum poſſeſſio granted by the Roman prætor, which leads me here to ſpeak of adminiſtration. I am not called upon in chapters upon civil law to go deeply into the doctrines of modern adminiſtration, they being generally well known.

I ſhall, however, here briefly note who are entitled to adminiſtration, with the different kinds of adminiſtrators, and obſerve on the different effects of probate and adminiſtration as to ſuits, and as to tranſmiſſion of rights.

Who are entitled to adminiſtration.]—I. The ordinary is compellable by ſtatute 28 H. VIII. ch. 18. in Ireland, to grant adminiſtration of the goods and chattles of the wife to the huſband, or his repreſentatives, and if he ſurvives the wife, to his next of kin—and of the huſband's eſtate to the widow or next of kin, either or both at his diſcretion.

N. B. Joint adminiſtrations are not favoured, as productive of contention, and *cæteris paribus*, the widow is uſually preferred.

II. Among the kindred, thoſe that are neareſt in degree to inteſtate are to be preferred, reckoning according to the computation of the civilians, children, parents, brothers, grandfathers, uncles or nephews, and the females of each claſs reſpectively, laſtly couſins, and of perſons in equal degree, the ordinary may take which he pleaſes.

III. Half blood is admitted as well as the whole; thus a brother of the half blood excludes an uncle of the whole—and adminiſtration may be granted to ſiſter of the half, or brother of the whole, at ordinary's diſcretion.

given by the prætorian authority from juſtice, where thoſe who had equitable claims, could

IV. If the kindred refuſe, it may be granted to a principal creditor.

V. If an executor refuſes or dies inteſtate, adminiſtration may be granted to a reſiduary legatee.

VI. In defect of all theſe, ordinary may chuſe any diſcreet perſon. If adminiſtration be granted contrary to the ſtatute, it is not void, but voidable. 1 P. Wms. 43. If adminiſtration be granted to the next of kin, the ordinary cannot revoke it without cauſe, and he may be compelled by mandamus to grant it to the perſon entitled. Comyns. Admn. b. 7.

Different kinds of adminiſtration.]—Beſides the general adminiſtrator hitherto deſcribed, adminiſtration may be granted for ſpecial purpoſes, or for limited times, as *pendente lite*, *durante minore ætate*, *durante abſentia*.

To ſubſtantiate a ſuit in equity, and make a decree perfect by having a perſonal repreſentative before the court, it is often neceſſary to apply to the eccleſiaſtical court to grant adminiſtration to the nominee of the party, which was uſually granted only for that ſpecial purpoſe. Much miſchief having ariſen from ſuch partial adminiſtrations, the court of prerogative now, in compliance with the wiſhes of the court of chancery, (which indeed refuſed to attend to ſuch adminiſtrations), inſiſts on ſuch nominee taking adminiſtration generally.

The other ſpecies of adminiſtrations explain themſelves, and are grantable to any proper perſon at the diſcretion of the ordinary, they not being within the ſtatute. For the powers of theſe adminiſtrators, ſee Walker and Woollaſton, 2 P. Wms. 576.

Different effects of probate and adminiſtration, and of adminiſtration granted wrongfully or by miſtake.]—Executor

not ſupport their title at law; or from neceſſity, where the perſons legally entitled refuſed to act. Emancipated ſons, and heirs diſinherited by inofficious wills, afforded inſtances of the former, and the want of a will, or its concealment, frequently gave occaſion to the latter; the grant might be *decretal* and temporary, till it was known who had the real right of poſſeſſion, like that to an *adminiſtrator pen. lit*; or it might be *edictal*, when there was no occaſion to hear parties judicially: the latter again might be *ſecundum tabulas*, where the heir inſtituted by ſtrictneſs of law could not act, (like an adminiſtra-

may grant, and releaſe, and commence an action or ſuit in equity before probate, but not maintain one. Adminiſtrator cannot commence an action before adminiſtration granted; executor may alſo releaſe or pay a debt, aſſent to a legacy, and be ſued before probate. See Wentworth's Office of Executor, and Comyns's Dig. Admn. b. 9.

The executor being appointed in ſpecial confidence, tranſmits his power to his executor, who however takes out letters of adminiſtration to the firſt teſtator, being entitled ſo to do; but the adminiſtrator of the deceaſed, being merely the officer of the ordinary, and the adminiſtrator of the deceaſed's executor having no privity with deceaſed, do not tranſmit their rights, and in ſuch caſes the appointment naturally devolves to the eccleſiaſtical court, who appoint a new adminiſtrator *de bonis non*.

Adminiſtration granted, if will afterwards appears, all acts done by the adminiſtrator are void, for adminiſtrator was not the repreſentative of deceaſed: but if adminiſtration be granted to a wrong perſon, and afterwards repealed, all acts done by the firſt adminiſtrator are good.

tion *cum teſtamento annexo)*, or *contra tabulas*, i. e. in contradiction to an inofficious will, which had diſinherited children without cauſe.

IX. COLLATIO BONORUM.] Where the goods were granted *contra tabulas*, if the perſon thus admitted by prætorian equity, had already received ſome preferment or proviſion, from the deceaſed, he was not to be admitted (125) into an equal diviſion, until he made an allowance for that part which he had received from teſtator while living. There was to be a general contribution, or collation of the goods, and the ſame rule held alſo in caſes of inteſtacy (126).

(125) If one of ſeveral daughters has had an eſtate given with her in *frankmarriage* by her anceſtor, *(i. e.* a ſpecies of eſtate tail, given by a relation for her advancement in marriage,) if lands deſcend from the ſame anceſtor to her ſiſters in fee ſimple, ſhe or her heirs, ſhall have no ſhare of them, until they bring the lands given in frankmarriage into hotchpot.

As to perſonal eſtate, the ſtatute of diſtributions in Ireland, 7 W. III. ch. 6. in its third ſection, ordains that no child of an inteſtate, except his heir at law, ſhall have a diſtributive ſhare, if he has already received an advancement or money, equal to the diſtributive ſhares of the other children; and if the advancement be not equivalent, ſuch child ſhall only receive ſo much as will make them all equal.

(126) To enter more into detail on executorſhips and adminiſtrations,—payment of debts, marſhalling of aſſets, &c. &c. would be to comment not on the Roman laws, but ours, *which latter I never meant to introduce except where points of compariſon occurred.* I therefore *verbum nil*

In all cases therefore whatsoever, the person previously advanced was obliged to a contribution, or *collatio*, before he could share.

amplius addam, except to make the following miscellaneous observations, that all assets being by the civil law equitable, and no distinction of real estates, from personal, it had no occasion for any method similar to that so celebrated among us, of making all the assets equitable, and all creditors come in *pari passu*, *by devising real estates for payment of debts*. That the general rule of the civil law, that none could die partly testate, partly intestate, which is unknown to us, was sometimes relaxed among them, even in cases of unprivileged persons, viz. by matter ex post facto, as if a son succeeded in an action for an inofficious will against one heir, and failed against another. See Dig. 5. 2. 15. That an administration obtained in a foreign country, as at Paris, is not taken notice of in our courts, 3 P. Wms. 371. That in Holland, a testament is valid without any distinction between moveable and immoveable estate, or between chattles and lands, if made before seven witnesses, according to the Roman solemnities, but it was generally made there before two echevins and a secretary, or before a notary and two witnesses, men not women. See Corvin. Enchiridion. Lib. 2. tit. 11. and that in France, formerly (for who can now pretend to say what the ever varying laws of that country may be at a given moment?) as well as in Spain and the Empire, testaments made before a notary and two witnesses were good and valid, though the testator and witnesses neither sealed nor subscribed, according to *Groenweg. de Legibus Abrogatis*, a work whose subject is most curious and interesting; but which I am forced to quote at second hand, not having been able to get it in this kingdom.

CHAPTER XI.

OF TITLE BY CONTRACT.

SIR William Blackſtone ſays, that amongſt us almoſt all the rights of perſonal property in a great meaſure depend upon contracts of one kind or other, or at leaſt may be reduced under ſome of them: he at the ſame time obſerves, that it is the method taken by the civil law, which (ſays he) has referred the greateſt part of the duties and rights of which it treats, to the head of obligations *ex contractu*, and *quaſi ex contractu* (1).

My anxiety to render the civil law familiar to the common lawyer, has induced me to depart from this method of the civilians, and to anticipate ſome of the ſubjects which Juſtinian conſidered under the head of contracts, particularly leaſes and mortgages, which I ſhall here again however notice, in their proper place (to ſpeak as a civilian), among contracts, in the

(1) 2 Black. Comm. 442.

light in which they are viewed by the Roman jurists.

Obligations, agreements, contracts, and covenants, are often used as synonimous words (2), and where they are distinguished, the distinctions are not uniformly agreed to, nor accurately observed. Perhaps the most useful distinction is, that contract is distinguished from obligation by being applied to (3) two persons, whereas obligation may apply to one only; and from covenant, as it relates to a thing present, covenant to a thing future (4). Yet Mr. Wood says, that a contract may affect one person only, and instances *mutuum* and *stipulation* as contracts where one party only is under an obligation, and where an action lies but on one side; and Mr. Woodeson asks, why may not a covenant relate to the past and the present, as well as the future (5)?

(2) Bacon's Abr. 526.

(3) A contract is an agreement,—a mutual convention or bargain—there must be two *contracting* parties, 2 Blac. Comm. 442. the particle *con* in the composition implies it.

(4) The debtor is obliged, not so the creditor; *present* sale is a contract, an agreement that a man *will* pay rent is a covenant. Blackstone distinguishes contracts into *executed*, and *executory*, the former differing nothing from grants, and distinguished from mere gifts, by being upon consideration.

(5) Wood, p. 165. Woodeson, Lec. 45. vol. 3. p. 85. Wood is not consistent, for he makes covenant to differ from obligation, as always affecting two persons, and makes contract a species of subdivision of covenant, viz. that in which

This nicety of diſtinction, however, not ſeeming to be abſolutely neceſſary in the common courſe of life, I ſhall proceed, without further inſiſting on it, to delineate the order of the Roman law upon the ſubject of obligations and contracts, which is moſt remarkably clear and methodical (6).

Obligation, ſays the Roman lawgiver, is *juris vinculum quo neceſſitate adſtringimur alicujus rei ſolvendæ ſecundum noſtræ civitatis jura.* The word *ſolvendæ* narrows the diſinition too much, and therefore legal writers interpret the neceſſity in general terms, *that of giving or doing ſomething* (7).

Obligations were divided into natural, civil or mixed, and ſometimes into civil and *prætorian.*

Obligations might ariſe from a lawful or unlawful act, in reality or by fiction of law, and therefore were of four ſpecies.

Ex Contractu.
Quari ex Contractu.
Ex Delicto.
Quari ex Delicto.

FIRST, OF OBLIGATIONS, EX CONTRACTU.

Contracts were either nominate or innomi-

there is a conſideration, yet afterwards ſays, contracts may affect one only.

(6) No man can read the claſſification of contracts in Juſtinian's Inſtitutes, without admiring the perſpicuous and beautiful arrangement.

(7) Otherwiſe innominate contracts would be excluded.

nate (8). Nominate contracts were such as had particular forms of actions assigned to them (9), from their frequency and general intelligibility.

They were Ex re—Ex verbis—Ex literis—Ex consensu.

Real.	*Verbal.*	*Literal*	*Consensual.*

Those Ex re,
were subdivided.

into	Mutuum,	*Loan for consumption.*
	Commodatum,	*Loan for use.*
	Depositum,	*Deposit.*
	Pignus,	*Pledge.*

Ex verbis,

into	Stipulationes,	*Stipulations.*
	Fidejussoriæ cautiones,	*Sureties.*

Ex literis,
admitted no subdivision.

Ex consensu.

Emptio & venditio,	*Sale.*
Locatio & conductio,	*Hire.*
Societas,	*Partnership.*
Mandatum,	*Commission.*

Innominate contracts, called also pacts, were such as being more rare, and not of the same defined and certain nature, the law had not provided any express or peculiar form of action to enforce, but had left them open to such suit as was best adapted to the occasion, which was called an action in *prescribed terms*, and seems to

(8) There was another division of contracts into *bonæ fidei & stricti juris.*

(9) See Powel on Contracts, 1 vol. p. 335.

have been analogous to our action on the case, as distinguished from an action of debt, *detinue*, *&c. &c.* (10).

Innominate contracts were usually ranked under four classes, expressive of the consideration on which they were founded, *and which was never pecuniary.* 1 *Do ut des.* 2 *Do ut facias.* 3 *Facio ut des.* 4 *Facio ut facias.*

Quasi contracts were implied obligations which supposed a previous agreement. Of all these species of contracts in their order.

OF NOMINATE CONTRACTS, AND FIRST OF CONTRACTS, EX RE.

Real contracts were those in which, besides the consent of the parties, the delivery of something was required to perfect the obligation. They were four in number. 1 *Mutuum.* 2 *Commodatum.* 3 *Depositum.* 4 *Pignus.*

Mutuum.]—Was the loan of consumable goods, of money, wine, corn, and other things that might be valued by number, weight and measure, and were to be restored only in equal value and quantity, and not the same specific and identical things. The absolute property was transferred to the borrower, *i. e.* they were lent for consumption, but he was answerable for their value, and therefore must bear the loss if they were destroyed by

(10) Such actions in prescribed terms were not distinguished by any specific names, but delineated by circuity and periphrasis. See Pandects, 19. 5. 5. Powel on Contracts, 1 vol. p. 335.

wreck, pillage, fire, or other inevitable misfortune (11).

Though the ſpecific thing was not to be reſtored, yet ſomething muſt be reſtored of the ſame nature, as well as of the ſame quantity and value; wine could not be returned for oil, or corn for wine: if it was, it was not a *mutuum*, but an exchange—not a nominate, but an innominate contract. To illuſtrate this contract ſtill further, living animals could not be the object of a *mutuum*, becauſe equal numbers might be of different value The *mutuum* is a contract of borrowing; it is intrinſic in its nature, that it ſhould be gratuitous without price or reward; if they followed, it would be changed into another contract, that of hiring; yet by ſpecial agreement there might be intereſt on it, but that was foreign to its nature, and did not ſpring from it. But its nature will be ſtill better underſtood by the deſcription of enumeration, viz. *Commodatum.*

Commodatum.]—The mutuum and commodatum were both contracts of borrowing, both of them ſuppoſed to be done to oblige the friend of

(11) See Jones on Bailments, p. 49. *Mutuum* is not claſſed with bailments, becauſe the identical thing was not to be reſtored to the owner, but another thing of the ſame quantity, nature and value. Sir W. Jones definition of bailments being a delivery of goods on condition, expreſſed or implied, that they ſhall be reſtored by the bailee to the bailor, or according to his directions as ſoon as the purpoſe of the bailment be anſwered.

neighbour, and conveying or containing no idea of price or reward in their own nature, though they might by ſpecial agreement; but herein they differed: The thing commodated was to be returned in ſpecie, not merely in quantity and value, the very ſpecific thing was to be returned —it therefore muſt be ſomething that did not conſume in uſe. Thus a horſe was a proper ſubject of commodation; corn, wine or oil, of mutuation. Mutuum was loan for conſumption; commodatum loan for uſe; in the former the property of the individual thing was changed, though its value was returned; in the other the ſame perſon remained owner, though the uſe was alienated for a time (12).

The ſixth title of the thirteenth book of the Digeſts ſhould be read upon this ſubject: although this contract was a grant without reward, by which it was diſtinguiſhed from letting to hire and from innominate contracts, and was alſo for a certain time, (by which it was diſtinguiſhed from a precarium, or grant at will) it induced

(12) The Latin language very happily expreſſes the fundamental difference between *commodatum* and *mutuatum*, which the poverty of ours confounds under the vague appellation of loan; in the former the borrower was obliged to reſtore the ſame individual thing with which he had been *accommodated*, for the temporary ſupply of his wants; in the latter it was deſtined for his uſe and conſumption, and he diſcharged this *mutual* engagement by ſubſtituting the ſame ſpecific value, according to a juſt eſtimation of number, weight and meaſure. Gibbon, vol. 4. p. 331. octavo.

obligations upon the lender which may appear extraordinary, ſuch as making him liable to an action, if the thing lent had defects known to the lender which injured the property of the borrower, as for inſtance a corrupted veſſel (13); or if he recalled the loan before the term expired: and, on the other hand, the borrower was ſubject to damages if he employed the thing lent to any uſe but that ſpecific one for which it was borrowed (14), and to intereſt if he kept it beyond the time limited. He muſt bear all neceſſary charges ariſing from the uſe of the thing lent, and could not detain it under a pretence or claim of debt (15).

And as this contract was entirely for the benefit of the borrower, he was anſwerable for the ſlighteſt neglect; if the loſs was occaſioned by extraordinary accident he was excuſed, but to expoſe the *commodated* property of another to the perils of a journey or a voyage, made him evidently anſwerable for the voluntary riſque (16).

(13) D. 13. b. 18. 2.

(14) D. 13. 6. 7. Si tibi equum commodavero ut ad villam adduceres, tu ad bellum duxeris, commodati tenebris.

(15) Code, 4. 4. 23. 4.

(16) Inſt. 3. 15. 2. *Propter majorem vim, majoreſve caſus, non tenetur, ſi modo non ipſius culpa is caſus intervenerit, alioqui, ſi id, quod tibi commodatum eſt domi, peregre tecum ferre malueris, et vel incurſu hoſtium prædonumvi, vel naufragio, amiſeris, dubium non eſt, quin de reſtituenda ea re*

Depoſitum.]—Was a contract by which a thing was committed to the cuſtody of another, to be kept without reward, and returned on demand. In the two laſt contracts the intereſt of the receiver was regarded principally, in this only the advantage of the perſon depoſiting: the thing depoſited was not to be uſed, another diſtinction from *mutuated* or *commodated* property; fraud and unfaithfulneſs in the bailee were puniſhed by an obligation to reſtore two-fold (17). If the thing was depoſited in a cabinet, and under lock and key, without depoſitary's being informed of the contents, he was only anſwerable for return of the cabinet back as he received it. If acquainted with the particulars contained, he was anſwerable for every particular (18). The depoſitary was anſwerable only for fraud, but groſs negligence would be conſtrued fraud: the conſervation (19)

tenearis; Puffendorf in vain endeavours to argue the contrary. Sir Wm. Jones has ſhewn in his eſſay on bailments, that the principles of our law on this head are the ſame: Commodatum is one of the five ſpecies of bailments, by him acknowledged; the others are *depoſitum*, *pignori acceptum*, *locatio* and *mandatum*. With each of theſe heads therefore the ſtudent ſhould read the correſpondent parts of that work of elegance, written by that prodigy of parts and information Sir W. Jones, attending particularly to the great queſtion of reſponſibility for neglect, on which Mr. Juſtice Blackſtone has ſaid little or nothing.

(17) Dig. 16. 3. 1. 1. (18) Ibid. 16. 3. 1. 41.

(19) Our law agrees, according to Sir W. Jones, (who confutes Lord Coke on this ſubject,) in his eſſay on bail-

of the thing being rather intended as a burthen than a benefit to him, only ordinary care was required from him; but a depositary might, by special agreement, make himself more responsible: so he might by a spontaneous officious offer, for thereby he may prevent their being deposited with a person of more vigilance.

The depositary was not to use the thing deposited, Inst. 4. 1. 6. he had not even a limited property in it, as our depositary has; his possession was considered the possession of the person depositing. I suppose, however, that common rea-

ments, where he divides neglect into *ordinary*, *i. e.* the omission of the common care which a prudent man takes of his own concerns; *gross*, the want of that care which every man of common sense, how inattentive soever, takes of his own concerns; and *slight*, the omission of that diligence, which very circumspect persons use. The civilians distinguished *culpa* into *lata*, *levis*, *levissima*.

Sir W. Jones observes, that it has been said, that *culpa*, by the *barrenness of the Latin language*, includes, as a generic term, various degrees or shades of fault, which are sometimes distinguished by epithets, and sometimes left without distinction; and that the divisions of neglect are rather to be looked for in the Greek translations, *a language rich and flexible*, and having terms expressive of every shade: but he is of opinion that the Greek jurists were not perfectly acquainted with the niceties of their own language. With respect to the depositary, he is even of opinion, that if he be a careless man, and his character known to the depositor, and he takes no better care of *his own* goods, that he is not responsible even for gross neglect.

ſon muſt have dictated an allowance to him to uſe the thing in a qualified manner, if it muſt have been injured by total non-uſe, as an animal (a ſporting dog for inſtance) for want of exerciſe and practice; but clothes were not to be worn. Queræ, as to books.

Under depoſits the civil law conſiders depoſits *pendente lite*, and gaming depoſits; the former it terms *ſequeſtrations*; *apud ſequeſtrem deponitur cum aliqua res in controverſiam deducitur* (20). Playing for money, and depoſiting the ſtake, was allowable, where the game was of a noble kind, ſuch as a trial of ſtrength or agility in the courſe or the palæſtra; but if the wager or bet regarded not ſome exerciſe honoured by public eſtimation, and uſeful in the ſchool of war, gaming was diſallowed, and all ſecurities for the ſame avoided; or if the money was paid, it was recoverable again, with one exception of allowance to the higher orders, to play for ſmall ſums. *Ad ſingulos congreſſus unum numiſma ſeu ſolidum deponere.* Code, lib. 3. tit. 43.

Pignus.—As the civil law did not diſtinguiſh (in delivering its rules and principles) between mortgages of land and mortgages of goods, and conſidered both under the head of contract; in varying from that order, and conſidering the for-

(20) D. 16. 3. 17. The ſequeſter, like a receiver or adminiſtrator, pen. lit. was to preſerve the thing ſafe, to ſell periſhable goods, and to allow the party aliment, and ſometimes coſts to carry on the ſuit.

mer under eſtates upon condition, I have neceſſarily exhauſted moſt of the material regulations applicable alſo to the latter: ſuch as redemption, priority, &c. &c. As our law, however, clearly makes the diſtinction, calling the latter pledges or pawns, I will not paſs them unnoticed in the ſpot aſſigned to both by the civil law, but ſhall confine myſelf chiefly to the degree of care required from the pawnee, and the extent of his power as to uſing the pledge.

The *mutuum* and *commodatum* were for the ſake of the receiver only, and the *depoſitum* for cuſtody and advantage merely of the perſon depoſiting, but the *pignus* or pledge was for the advantage both of creditor and debtor; from the pawnee therefore ordinary care was required in the keeping of the pledge (21), ſomething more than that uſually exerciſed by men in *general* about their private affairs, whatever may be the caution of certain more prudent individuals. If therefore the pledge was ſtolen, not only the debt was diſſolved, but the pawnee was alſo anſwerable in damages: but if it was taken by violence, as by open robbery, the creditor did not loſe his debt, nor was he anſwerable for the value, unleſs it had been expreſsly ſtipulated between the parties, that the loſs of the pledge ſhould diſſolve the debt (22).

(21) Sir W. Jones again proves this to be the rule of our law in oppoſition to Lord Coke.

(22) Code, lib. 4. tit. 24. *de pignoratitia actione. Crediter*

The pawnee might uſe the goods, if the uſing was attended with no prejudice, or rather if it was neceſſary, as the milking of a cow, but the benefit or value of the milk, or ſuch like produce of the uſer, reſulted to the pawner (23). As in immoveables ſo in moveables, if payment was not made of the principal debt within a certain time, the creditor might alienate and ſell the ſame. The perſon was not diſcharged by the pledge given if it did not anſwer the debt; if the debt exceeded the value of the pawn, an action might be brought for the remainder; and if the pledge was evicted, the pawnee became perſonally liable to the creditor in damages.

CONTRACTS EX VERBIS.

Stipulations.]—Theſe were ſolemn promiſes confirmed by certain ſolemn and ſet form of words, by queſtion and anſwer, ſuch as *ſpondes? ſpondeo*; *promittis? promitto.* If the promiſer to

pignora, quæ fortuitis caſibus interciderint (in quibus aggreſſura latronum) præſtare non compellitur, nec a petitione debiti ſubmovetur, niſi inter contrahentes placuerit, ut amiſſio pignorum liberet debitorem. Sir W. Jones ſhews the uſage of modern Conſtantinople to be the ſame.

(23) If pawnee loſe goods without any default in him, it ſhall be the loſs of the owner, but if uſing be no prejudice to the goods, he may uſe them, Salk. 522. The inſtance of milk is put, Owen, 124. but by our law the milk or produce, as calves, &c. &c. would belong to the pawnee.

added to the obligation it was null, and a ſimple obligation aroſe, the performance of which might be inſtantly demanded (28).

A contract by ſtipulation to be executed after the deaths of the parties, (before the time of Juſtinian) was not valid: becauſe an obligation could not begin from the heir, nor could a man bind his heir without binding himſelf, from their imaginary unity.

Under the title of ſtipulations the civil law has alſo treated of contracts contrary to good morals or ſound policy, which are all thereby avoided (29).

It muſt be noted, that the forms of ſtipulation were aboliſhed by the Leontine Conſtitutions, and that long before prætorian relaxation and

(28) Our law diſtinguiſhes between conditions precedent and ſubſequent, and between conditions poſſible and impoſſible at the time of the making: ſo, if the undertaker neglected to weigh his own ſtrength, or alone knew the impoſſibility, he is anſwerable in damages.

(29) Pacta quæ contra leges, conſtitutioneſque, vel contra bonos mores nullam vim habere, indubitati juris eſt. Code, lib. 2. tit. 3. 6.

Quod turpi ex cauſa promiſſum eſt non valet. Inſt. lib. 3. 20. 23. but ſuppoſe the money paid, *ubi & dantis & accipientis turpitudo verſatur repeti non poteſt, ubi ſolius accipientis poteſt; ſed quod meretrici datur, repeti non poteſt, non enim turpitur accipit*; a ſtrange poſition. See. Dig. lib. 12. tit. 51.

How far a particeps criminis would be relieved, ſee Dig. lib. 12. tit. 51. l. 3. 4.

legal ingenuity were combined to put all equitable agreements upon as firm and ſolid a ground. Theſe ſtipulations had been four-fold, *judicial*, as when ſecurity was ordered to be given againſt fraud; *prætorian*, as when ſecurity was demanded *de damno infecto*; *conventional*, by the agreement of the parties; and *common*, for the ſecurity of a minor.

Sureties.]—Others frequently bound themſelves for the man who promiſed, and theſe ſureties were called *fide juſſores*. They might be received in all obligations whatſoever, and they bound not only themſelves but their heirs, even without expreſs mention (30); ſuch was the caſe, ſays Wood, in all contracts, whether proper or improper, and all the ſureties were bound ſeverally, although not ſo expreſsly ſpecified. The fide juſſor had the advantages called *beneficium ordinis*, by which he could force the creditor firſt to ſue the principal, and *beneficium cedendarum actionum*, that of obliging the cre-

(30) No ſo with us as to the heir, but the executor is bound without expreſs mention.

The ſecurities taken in the court of admiralty in the nature of bail, are ſtipulations and fide juſſory cautions, and ſo called. A prohibition would go if that court took a recognizance, it not being a court of record; there were great conteſts on this ſubject formerly. See Zouch, Godolphin, and 2 Lord Raymond, 1285. Theſe ſtipulations have no priority before ſpecialty debts, nor do they affect lands.

ditor to assign to him on being paid, to enable him to sue a fellow surety. Minors could not be sureties nor soldiers (31); nor women by the *senatus consultum velleianum.*

Surety might pay before action brought (32); if surety was in peril, he might sue before term of payment, to be indemnified or discharged (33); if no personal security could be had, creditor might have a juratory caution from his debtor.

CONTRACTS EX LITERIS.

The contract by writing was called *literarum obligatio*; these written contracts after a certain time, if they expressed their cause or consideration, stopped the mouth of the contractor from denying his debt or obligation, even supposing he had not received that which he thereby acknowledged to have been to him paid or delivered (34): within two years, however, the debtor was not barred from pleading that the money was never paid, or goods delivered, and throwing the proof upon the creditor.

A stipulation, after being made in solemn form of words, might be reduced to writing.

(31) See Code 4. 65. 31.

(32) Dig. 17. 1. 10. 11.

(33) Dig. 17. 1. 38. 1.

(34) As with us, want of consideration cannot be averred by the obligor of a bond against the obligee, nor by the maker of a note against the indorsee.

CONTRACTS BY CONSENT (35).

Conſent *alone* (without any thing delivered as in contracts *ex re*, or ſolemn form of words as in contracts *ex verbis*, or writing as in contracts *ex literis*) may make a perfect contract (36). It is divided into four branches: 1. *Emptio & vendicio*, the contract of ſale. 2. *Locatio & conductio*, the contract of hiring and letting to hire. 3. *Societas*, or partnerſhip. 4. *Mandatum*, or commiſſion.

Contract of Sale.]—By the civil law, all contracts of ſale were good without writing, to whatever value they extended (37). The Inſti-

(35) The wide and various ſubject of contracts by conſent is ſpread over four books (from 17th to 20th) of the Pandects, and is one of the parts beſt deſerving the attention of the Engliſh ſtudent. Gibbon, vol. 4. p. 330. octavo.

(36) This does not mean conſent without *conſideration*, but conſent without the requiſites mentioned in the preceding ſpecies of contracts. This contract might be made between perſons, though abſent, by letter; or through intervention of others: ſtipulations required the preſence of both parties.

(37) Our ſtatute of frauds has made the law with us very different; it enacts, that no contract for the ſale of goods, wares, or merchandiſes, for the price of 10*l.* and upwards, ſhall be good, except the buyer ſhall accept and actually receive part of the goods ſo ſold, or give earneſt to bind the bargain or in part payment, or unleſs ſome note or memorandum in writing be made and ſigned by the parties, or their lawful agents.

tutes begin their precepts on this contract, by declaring that it is perfect as ſoon as the price of the thing is agreed upon (38); and there not only ought to be a price, but a *certain* price, which Juſtinian ordained ſhould be conſidered as containing ſufficient certainty, if the agreement was, that the thing ſhould be ſold at a price to be fixed by a third perſon; if the price was fixed, the buyer might have the action *ex empto* againſt the ſeller for delivery of the goods, the ſeller an action *ex vendito* for the price, though no writing or earneſt (39); not ſo if no price was fixed, and therefore the Inſtitutes ſay, 3. 24. 1. at the end of the ſection, *de emptione pura*, &c. &c. *Nulla emptio ſine pretio eſſe poteſt.* But if the goods *were delivered* without price fixed, the price might be ſettled by teſtimony of their value, and in ſuch caſe the ſmalleſt value was adopted.

(38) Read upon this whole contract the twenty-fourth title of the third book of the Inſtitutes *paſſim*; the title is, *De emptione & venditione.*

(39) Beſides the actions *ex empto & vendito*, there were four *prætorian* actions applicable to this contract: *Redhibitory*, to compel ſeller who did not diſcover faults in the ſubject matter to the buyer, to take the goods again, and for damages. *Quanto Minoris*, for reduction of price, when both ignorant of the fault. *On the caſe*, for *knaviſh* concealment. *Eſtimatory*, when the goods ſold for more than their value, from falſe commendation or puffing; a ſad reſtraint upon Roman auctioneers.

But theſe rules reſpecting the perfection of this contract, were altered by Juſtinian when the contract was in writing; there was no obligation to put it in writing,—writing was not eſſential, but if inſiſted on by the caution or jealouſy of the parties, it muſt be attended with certain ſolemnities to obtain the *fidem inſtrumentorum* (40). The inſtruments of ſale were to be written by the contracting parties, or at leaſt ſigned by them; and without theſe precautions, or if they were drawn by a public notary *(tabellione)* if any the ſmalleſt formality was omitted, they might recede from their bargain with impunity, unleſs *arrha* or earneſt had been given. Though earneſt did not conſtitute the contract, but ſerved only as proof of it, and though without it, as we have ſaid, the contract was complete, and rights of action veſted, yet it did ſubject the buyer, if he receded from his bargain, to the loſs of that earneſt (41), and the ſeller to damages in double its value.

(40) See Code, l. 4. tit. 21. *De fide inſtrumentorum*, a title very worthy of peruſal, C. 17. *Quas in ſcriptis fieri placuit non aliter vires habere ſancimus niſi*, &c. &c.

(41) Sir W. Blackſtone repreſents our law as differing, and ſays the property is abſolutely bound by the earneſt, amongſt us. Mr. Chriſtian thinks otherwiſe (and quotes 1 Salk. 113.) ſo does Mr. Juſtice Buller. And undoubtedly they are right, if Mr. Blackſtone meant that the property was transferred, which I do not conceive he could. Earneſt has the ſame effect with us, which fixing

The Roman lawyers were much divided on the queſtion, whether the price muſt always conſiſt of money, or whether it might not be compoſed of other commodities;—in other words, whether *commutation* was or was not a ſpecies of contract ſeparate from vendition. The Proculeians and Sabinians, two great parties at the Roman bar, (whoſe great ground of conteſt ſeems to have reſembled one not unknown to modern times, viz. whether equitable conſtruction and prætorian laxity ſhould encroach in the legal forum on the rigid lines of ſtrict law) eſpouſed different ſides of this agitated queſtion. The diſtinction was conſidered by the Proculeians as important, becauſe different rules were applicable to *ſale* and to *exchange*, in determining, for inſtance, *when* the property veſted, and who ſhould be liable to intervening loſs between the contract and the delivery. Their opinion prevailed, and received the ſanction of the Imperial court (42).

the price had in the civil law: it binds the bargain, ſo that the vendee has a right to the delivery of the goods, on demand within a reaſonable time. But both by the civil law and ours, the property is in the ſeller till delivery, *qui nondum rem emptori tradidit, adhuc ipſe dominus eſt*, ſay the Inſtitutes. Lib. 3. tit. 24. ſec. 3.

(42) Lawyers, in all periods, have been oſtentatious of diſplaying claſſic taſte, though the reſt of the world has not in general acknowledged much connection between law and Belles Lettres. Even the grave Littleton, as Lord Coke ſays, *quoteth verſes*; but perhaps none but the Roman

The Inſtitutes, in the next place, treat of the riſk or profit between the time of the contract made and delivery of the ſubject (43); the moment the price was fixed, the riſk veſted on the buyer; and he became liable to all accidents, which happened without the fraud or fault of the ſeller, unleſs the ſeller eſpecially took the riſk upon himſelf, or unleſs the loſs was occaſioned by his improper delay of delivery (44). The ſeller in his turn was obliged to aſſign over all rights of action exiſting in him to the buyer, to compenſate his riſk and aid his claims.

Inadequacy of price was no cauſe for annulling the contract, (as it is in our courts if the bargain be plainly iniquitous), but the civil law, with reſpect to immoveables at leaſt, fixed the term of that inadequacy which ſhould defeat the con-

lawyers ever quoted them as legal authorities. The Proculeians and Sabinians, in the controverſy mentioned above, appealed to Homer; and Juſtinian in his Inſtitutes, and Paulus in the Pandects, have gravely introduced their quotations from the Iliad and the Odyſſey.

(43) Inſtitutes, lib. 3. tit. 24. ſec. 3. *de periculo et commodo rei venditæ.*

(44) I ſhould recommend to the ſtudent to compare here, with the tenets of the civil law, the caſes collected by Mr. Juſtice Buller, in treating of the action of trover. Such as Colſton and Woolſton, &c. &c. The buyer with us appears not to be liable to the riſk, until he actually gets poſſeſſion, or the goods be delivered to a carrier or conveyance choſen by himſelf.

tract, viz. half the real value. Circumvention, therefore, in all cases, at least to half the value, it seems to have allowed, *(mirabile dictu)*, whereas our law, and the law of reason, would consider the nature of the transaction, and not authenticate partial fraud; but on the other hand, it demands a manifest preference to our system, in obliging the seller not only to warrant the title, but to warrant the goodness of the commodity. He was obliged, if he wished his bargain to stand, to explain every fault within his knowledge (45) to the buyer, or else there was an *implied* warranty of their good quality; whereas with us the maxim is *caveat emptor*, and if the seller does not disguise, or misrepresent, his silence does not make him responsible; he must *expressly* warrant to subject himself to responsibility (46).

The seller seems to have had an advantage not given by our laws, that of interest on the payment if delayed (47), and on the other hand, the buyer was privileged in being entitled to damages for

(45) Dig. lib. 21. tit. 1. c. 1. s. 1.

(46) It is very extraordinary that these codes should have each of them adopted in its turn maxims seemingly the most inequitable; with respect to one article, viz. *horses*, it seems to be now agreed, that with us a sound price implies sound goods; in the name of reason why should not the maxim be universal?

(47) It has been proposed to make shop debts bear interest.

eviction, even though the ſale was in market overt (48).

Some ſpecial covenants, uſual at Rome, deſerve notice; it was ſometimes covenanted, that at any time, before a certain fixed day, the ſeller might contract with any other perſon who would offer a better price, which covenant was called *addictio in diem*; or that if the price was not paid before a certain day, the bargain ſhould be void, an agreement called *pactum commiſſorium*; or that the ſeller ſhould have a preference in repurchaſe, if the buyer grew tired of his bargain, a reſervation called *jus retractus* (49).

Some regulations alſo of a political nature reſpecting this contract are worthy of attention: Monopolies were ſtrictly prohibited; the farmer was ſometimes obliged to bring his corn to market, the price of commodities might be fixed by the magiſtrate, and combinations to enhance the price of work were puniſhed with ſeverity, ordinances not neglected by our ſtatute law (50).

(48) D. 18. 6. 19. (49) D. 18. tit. 2. 3. and 5.

(50) With the price of commodities, our laws however have meddled very ſparingly, nor am I ſo little acquainted with writers on political economy, not to be attached to thoſe who condemn forcing by bounties, or curbing by prohibitions; yet though the doctrine in general may be true, that the market ſhould always be left to find its own level, yet I will not ſay that they are never to bow to circumſtances; I will not ſay, that when a neighbouring nation fixed an ultimatum to the price of proviſions, they might

It is under this head that the civil law conſiders thoſe reſtraints on purchaſe, which, in compliance with the mode of our law, I arranged under Title By Alienation. Thus the prohibition as to things ſacred and public, to eſtates under ſubſtitution or entail, to the *fundus dotalis*, and as to alien purchaſers, are enumerated under this contract in the Pandects and Code; and the conveying (51) of arms and contraband goods to enemies, is alſo ſpecially prohibited in the latter.

Though the civil law was minute in its regulations of trade, it did not pay honour to the commercial ſyſtem, as appears from Code lib. 4. tit. 63. *de commerciis et mercatoribus.* In its

not have been for the moment wiſe; nor would I venture to pronounce that a temporary legal reſtraint or ultimatum to the price of lands in this kingdom, viz. that it ſhould never exceed a certain proportion of the profits of the ground, and thereby give to the terre-tenant the encouragement which political economy requires, would be altogether a wild idea. But perhaps it is too adventurous for laws to meddle with that which time and reaſon, and the real intereſt of the head landlord will probably cure, unleſs the ignorant impatience of the tenant prevent it.

(51) Dig. 18. 1. 34. 1 and 2.

Code 4. 51. 7. Holland, in the exceſs of commercial avidity, while it embraced with eagerneſs moſt of the proviſions of the Roman law, rejected this; and the Dutch, at the ſiege of their own towns, have *legally* ſupplied the enemy with ammunition. Groenweg. de legibus abrogatis.

third ſection it is ſaid, *nobiliores natalibus et honorum luce conſpicuos, et patrimonio ditiores, mercimonium exercere prohibemus, ut inter plebeios et negociatores facilius ſit emendi vendendive commercium.* Unleſs perhaps it be ſaid, that this was to prevent the ſmaller traders from being overpowered. A compariſon between the contract of exchange, and the contract of ſale, will elucidate the meaning of contract by conſent in the Roman law. Exchange was not perfected by *bare conſent*, actual permutation muſt take place before the contract was perfect, from an agreement to exchange no action aroſe, nor could the riſk be transferred from one to another before actual permutation, ſo that the diſtinction between theſe contracts was far from being nominal.

Under the head of exchange (52), or commutation, Wood drags in money, exchange, and banking. Bankers there were at Rome called *Nummularii et Argentarii*, but how far they reſembled modern bankers it would not be eaſy to aſcertain. They ſeem to have been alſo notaries public, and with them mortgages and other transfers of property were regiſtered. As to bills of exchange, they are generally held to be of modern invention; and Mr. Blackſtone traces the origin of paper credit to China, about the thirteenth cen-

(52) Ayliffe ſeems to conceive that a tranſaction mentioned Dig. 14. b. 16. reſembled a ſon's drawing a bill upon his father.

tury; *cambium* exchange comes from an obſolete word cambio *permuto.*

Contract of hiring.]—The civil law always affecting extreme accuracy in treating of contracts, labours to draw exact limits between the contract of hiring, and the contract of ſale: the boundary may be ſometimes nice, and the diſtinction neceſſary: they agree in this, that as the former contract is complete by ſettling the *price*, ſo is the latter by fixing the *hire*; and the hirer or *conductor* is immediately entitled to his action *conducti*, as the *locator* or letter to hire is to his *actio locati.* They agree alſo in not requiring any ſolemn form of words, in the contract being reciprocal, and in the price or hire not being payable if eviction *in limine:* they differ in this, that in bargain and ſale, the contingent hazard falls on the buyer; in hiring and letting to hire on the letter or *locator*, unleſs the contrary be agreed on, or the hirer be in fault.

Hiring might be either hiring of property, as of land or cattle, or hiring of labour or ſkill; of the labour of a workman or ſkill of a phyſician: of the hire of immoveable property, we have treated under the head of Leaſes; of the hire of moveables I ſhall here treat as far as reſpects the care and diligence required in the hirer. The diligence and care to be uſed, according to Sir W. Jones, was ordinary diligence, ſuch as a prudent man would uſe about his own property. If a horſe was hired, it was to be rode and uſed as

a man of common diſcretion would uſe his own horſe. If furniture was to be hired, no damage was to be reimburſed but what aroſe from the want of ordinary care, either in the hirer or his ſervants (53), and for the laſt the maſter was not always anſwerable. But for the minutiæ of this learning I muſt refer the reader to the 2d title of the 19th book of the digeſts, *locati conducti*, and particularly to the eleventh ſection, which begins *videamus an et ſervorum culpam præſtare conductor debeat*, and inſtances in caſes of fire, &c.

The hire of labour *locatio operis*, is, by Sir W. Jones, divided into two branches, *faciendi et mercium vehendarum*: through them both, Sir W. Jones inſiſts that the ſame principle prevails; that ordinary, and not the moſt exact care and diligence is requiſite. Thus the inn-keeper repels the preſumption of knavery or default, by proving that he took ordinary care, or that the force which occaſioned damage to the goods was irreſiſtable, though he is liable prima facie for all goods of his gueſt ſtolen or loſt by the negligence of him or his ſervants; and the carrier for hire, (though his being made liable for the value in caſe he be robbed, ſeems to be a contradiction to

(53) Here again Sir W. Jones has ſhewn, not only that this was the doctrine of the civil law, notwithſtanding ſome miſtaken paſſages, but that our law agrees, and that both agree with the laws of the wiſeſt nations, even of the Perſians, Turks, &c.

the rule, as that ſeems to be inevitable accident), has been laboriouſly argued by the ſame learned author to be within the ſame rule; for, ſays he, this is only an exception introduced by the great maxims of policy and good government, leſt confederacies ſhould be formed between carriers and banditti; ſo that the loſs is not conſidered as being of neceſſity, or always owing to inevitable accident (54.)

Thus far I have implicitly followed Sir W. Jones, but delightful as his attempt to harmonize the opinions of all civilized nations on the ſubject of bailment is, ſome may be ſtartled by its application to the labour and ſkill of men in the learned profeſſions; to ſay that from the lawyer or the phyſician (55), ordinary care and diligence

(54) Sir W. Jones thinks, that in the rule concerning a common carrier, viz. that nothing can excuſe him but *the act of God*, or of the king's enemies, in the place of the firſt exception, it would be more proper, as well as more decent, to ſubſtitute *inevitable accident*.

(55) Gentlemen of theſe faculties, though they might be expected to be termed *locatores*, in ſpeaking of this contract are called *conductores*, i. e. they were conſidered as hirers of the work to be done, *operis faciendi*, though in their turn they *located* or hired out their pains and ſkill. The Roman law, though it brought the labour of theſe profeſſions under the head of this contract, was anxious to diſtinguiſh that of the lawyer, by ſaying, it was not *merces*, but *honorarium quiddam*, not *price* but *reward*; a diſtinction much more juſtly claimed by the modern lawyer, who cannot bring an

only are requiſite, and that they are not reſponſible for deficiency in the moſt exact attention to the affairs of the client or diſeaſe of the patient, or at leaſt that the omiſſions for which they could *veniam dare* to themſelves, they would have a claim *viciſſim petere* from others, may not be perfectly reconcileable to common opinion. A ſurgeon has been made liable in damages for deviation from common practice, and an attorney for omiſſions ſeemingly pardonable.

I believe, however, it will be found that his principle, well examined, is right, and that nothing but the want of common ordinary reaſonable diligence, could affect the pocket of the

action for his fees: for Antoninus Pius ordained *juris ſtudioſos, qui ſalaria petebant hæc exigere poſſe*, Dig. lib. 50. tit. 13. In the ſame title is aſcertained what ſhall be deemed the liberal arts, among which medicine is ranged, *medicorum eadem cauſa quæ profeſſorum, niſi quod juſtior, cum hi ſalutis hominum illi ſtudiorum curam agant.* The contempt for theſe profeſſions in France did not originate with the civil law.

It appears from Tacitus, that in the reign of Claudius Cæſar, the bar was diſhonoured by aſtoniſhing perfidy after the receipt of immoderate donations; a great clamour was raiſed, and the enforcement of the Cincian law loudly called for, by which it had been of old provided, *ne quis, ob orandum cauſam pecuniam donumve acciplat.* It was complained *inimicitias, odia & injurias foveri, ut quomodo vis morborum prætia medentibus ſic fori tabes pecuniam advocatis ferat*; the reſult was, that the Emperor fixed the higheſt fee of an advocate at *dena ſeſtertia*, about 80l. 3s. of our money.

practitioner through the medium of a verdict, however it might through the medium of his character (56). Yet to ſupport his general principle, he has combated not only with a great modern opinion, but with that of one very celebrated in his time, the Roman Caius, who ſays, *Qualem diligentiſſimus pater familias ſuis rebus adhibet.* This authority the ingenious judge oppoſes by ſtating the energetic temper of Caius, (whom Juſtinian in his Inſtitutes uſually follows) who was fond of ſuperlatives, while his meaning was much weaker than his words, a liberty which few would venture to take to change the words of an opinion, from knowledge of the impetuoſity of its framer.

Under the contract of hiring, the conſideration of *intereſt* is naturally introduced. The thirty-ſecond title of the forth book of the Code treats *de uſuris*, in its 27th ſection, fixes the rates of intereſt demandable by various perſons. Great and illuſtrious perſons could only demand four per cent. legaliſed traders might demand eight, but *pecunia trajectitia*, or money lent on bottomry, might bear *centeſimæ uſuræ*, or twelve,

(56) In fact this principle does not differ from the common ſentiment, for ordinary diligence in this caſe means a degree adequate to the performance of the undertaking. Lord Holt and Mr. J. Blackſtone make no diſtinction between a commodatum and a locatio, in ſpeaking of this contract. Inſt. lib. 3. tit. 25. *Cuſtodiam*, &c.

per cent. intereſt, which was the higheſt rate allowed at Rome (57). In ordinary caſes ſix per cent. was the legal rate, and to exceed this, or make an uſurious contract, was ſeverely puniſhable, poſitively by mulcts, negatively by incapacities. I have obſerved that a uſurer could not even make a teſtament.

Mr. Gibbon ſays, that Juſtinian does not deign to treat of intereſt in the Inſtitutes. But in the Code and Pandects, many rules reſpecting it are given, among which two of the moſt notable are, that intereſt ſhall never exceed the principal, and that intereſt ſhall not be given upon intereſt. In the times of the Republic, no intereſt could be demanded except by ſpecial agreement. The Emperors gave it on all contracts, *bonæ fidei*, and alſo on legacies and truſts: intereſt was not eſteemed by the civil law a natural produce, but given only to recompence delay of payment, and if the cauſe were in its own nature unproductive,

(57) Mr. Gibbon ſeems to agree with me in thinking, that twelve per cent. was the higheſt intereſt allowed in any caſe in the times of the emperors. Wood and others repreſent intereſt on bottomry as unlimited as the riſque. The Roman method of computing intereſt has been perfectly explained by Mr. Blackſtone in a note to Book 2. ch. 30. the principal was ſuppoſed to conſiſt of one hundred parts, if the amount of one of theſe parts was paid monthly, *it was centeſimæ uſuræ*, or twelve per cent.

it was not given before demand in a court of juſtice (58).

Societas.]—Partnerſhip with the Romans was either in ſome particular thing or ſubject, or in joint labour and its profit, or in goods advanced by one, and labour or work by the other, or in the whole property of the parties; in the latter caſe, any new acquiſition by inheritance or gift, ſubſequent to the contract of partnerſhip, did not come into the common ſtock.

(58) So with us upon bonds, no intereſt beyond the penalty, and intereſt not allowed upon intereſt, with ſome ſpecial exceptions. When the reader finds a title in the Digeſts, another in the Code, and a third in the Novel Conſtitutions, *de nautico fœnore*, he might expect much information upon bottomry and inſurance. But the titles are ſhort, and the information brief and general. They tell little more than that the creditor on bottomry ſhall, on account of the riſque, be entitled to extraordinary intereſt, determine the commencement and duration of the riſque, and illuſtrate the general doctrine by one or two examples. In modern commentators on the civil law, and not in the text of the civil law itſelf, we are to look for information on theſe important ſubjects. From theſe, learned judges, and Lord Mansfield particularly, derived much of that copious information which they have transferred into our law, which tranſfuſion, illuſtrated by reporters, and by Molloy, Beawes, Weſket, Parke, and Miller, may, unleſs when very ſpecial caſes ariſe, ſave the trouble of much further ſearch. However, within modern experience, cauſes have occurred, in which a ſearch into the modern voluminous works of foreign commentators, has repaid the pains.

The view which the Inſtitutes take of this ſubject (for they do not here treat of partnerſhip in lands, which has been ſpoken of above in the chapter of Joint-tenancy) is quadruple.

Firſt. Of the ſhares of profits or loſs.

Secondly. How partnerſhips were diſſolved.

Thirdly. The diligence and care requiſite in partners.

Fourthly. What actions lie ultimately between them.

If no expreſs agreement had been made, the loſs was to be equally borne, and the profit equally divided, or rather in proportion to the ſhares advanced by each contributor. Much controverſy had exiſted among the Roman lawyers, whether a ſpecial agreement, that one partner ſhould receive two-thirds of the profit, and bear but a third, or perhaps no part of the loſs, ſhould be valid; Mucius ſupported the negative, Sulpicious the affirmative: the opinion of the latter, ſupported by the reflection that the labour of the one may be as important as the money of the other, ultimately prevailed; if one partner gained by means of the common ſtock, the profit muſt be divided of courſe; but if any gain accrued, or loſs fell upon him in conſequence of tranſactions unconnected with the partnerſhip, he alone was concerned (59); each party was entitled, out of the common ſtock, to reaſonable maintenance for

(59) D. 17. 2. 59. 1.

his family, but to no allowance for expences occurred by gambling or other vices (60). Partnerſhip was implied, if men lived together and acted as joint traders, or if a payment was made by one in the name of the partnerſhip (61).

Partnerſhip was diſſolved by death of one of the partners, if there were ever ſo many; the partnerſhip itſelf could not be made to deſcend on heirs (62), but the partnerſhip covenants might; the profits paſſed to the heir, though the partnerſhip did not (63). This contract was alſo diſſolved by any one partner renouncing the ſociety, but if he did this from a fraudulent motive, or ſecret view of ſcreening his own property from fair debts, he was counteracted by the providence of the law.

Accompliſhment of the purpoſes of a ſpecial and limited partnerſhip, confiſcation, inſolvency, bankruptcy terminated this union; but covinous attempts to defeat creditors were oppoſed by or-

(60) D. 17. 2. 52. 15. 10.

(61) With us, ſale by one partner is ſale by all; payment to one is payment to all; dealing with one generally in matters concerning their joint trade, charges all; but a fi. fa. againſt one for his ſeparate debt, does not affect the partner.

(62) D. 17. 2. 59.

(63) With us there is no ſurvivorſhip among partners in trade and merchandize; if of two partners one dies, a creditor may charge the other with the whole.

dinances not unlike our ſtatutes to prevent fraudulent alienations (64).

The partner was obliged to obſerve only the ſame ordinary care and diligence in the affairs of the partnerſhip (65), which he obſerved in keeping his own private property. Inſt. lib. 3. tit. 26. ſec. 9.

The action given to the partner was the action *pro ſocio*, which was directed on both ſides (66); this action lay, if a partner had converted any part of the common ſtock to his own uſe (67), or received too great a dividend; ſo if he had ſuſtained damage on account of the partnerſhip, or laid out money on the common ſtock (68); ſo he might recover againſt the heir of a partner for the fraud or negligence of the perſon ſo repreſented.

Mandatum (69).—This contract includes authorities, and the powers of factors and attornies

(64) In theſe countries, diſſolution of the partnerſhip, publicly known, will prevent one from being affected by ſubſequent contracts made by the others, but does not invalidate previous demands againſt the joint ſtock.

(65) See Dig. lib. 42. tit. P. which is *quæ in fraudem creditorum facta ſunt reſtituantur.*

(66) By direct, was meant a legal in contradiction to an equitable ſuit, which latter was called Utilis Actio.

(67) Dig. 22. 1. 1. 1.

(68) Dig. 17. 2. 52. 4. and 17. 2. 38. 1.

(69) See lib. 3. Inſt. tit. 27.

where they acted gratuitously, and also bailments of property to be conveyed from place to place without reward (70); for it was essential to this contract that it should be gratuitous, since if the thing was done for reward, it became the contract of location and conduction; hence, Jones prefers the word mandate to commission, because commission generally includes hire.

The civil law distinguished mandates into those given for the sake of the mandator or mandatory, or both, or of a stranger jointly with either, or singly by himself; if the mandate was given simply for the sake of the mandatory, it was rather advice than contract, and not the subject of an action, unless it was fraudulently intended, and then the adviser was answerable.—D. 50. 17. 47.

If the mandate was contrary to good morals, it

(70) The celebrated case of Coggs and Bernard, was of a *mandatum*. The mandatory there undertook to carry brandy from one place to another, and in the carriage he managed it so negligently, that one of the pipes was staved; it was decided that he was responsible, though the defendant resisted on the ground that he had not undertaken to carry it safely and securely, because this was implied as far as ordinary care; and thus, says Sir W. Jones, a case which the first elements of the Roman law have so fully decided, that no court of judicature on the continent would suffer it to be debated, was thought in England to deserve very serious consideration. 2 Lord Raymond, 909.

was not obligatory, as to commit theft or any other crime (71).

The mandatory was not to exceed the bounds of his commiſſion or authority, but the commiſſion need not be obſerved ad unguem, it was ſufficient if the probable mind and intention of the mandator was purſued. The diligence required of him was ordinary diligence, adequate, however, to the performance he undertook, unleſs by ſpecial convention he undertook for more, or by voluntary offer had prevented another who might have been more diligent from being employed (72); inevitable accident therefore excuſed, or violence, ſuch as force and robbery, unleſs the party had unneceſſarily expoſed himſelf to that danger (73).

A mandate became null by being revoked *dum res integra ſit*, before any act had been done in conſequence of it; ſo it did by the death of either party while it continued entire, unleſs the thing to be performed was to be done after man-

(71) Contra bonos mores in the canon law, meant only acts *mala in ſe*, not mala prohibita. The civil law included both in this phraſe.

(72) Coggs and Bernard. 2 Lord Raymond, 909.

(73) A. had undertaken as a friend to bring money from the country to town: on his arrival at night, inſtead of lodging the money at his own houſe, he walked in the ſtreets with the money about his perſon, and was robbed; ſuch a caſe, not many years ſince, came before a jury in Ireland, who gave the bailor a verdict againſt A.

dator's death (74). Every one was at liberty to refuſe ſuch a commiſſion, as he would refuſe a depoſit; but if he once undertook it, he muſt either perform it, or renounce as ſoon as poſſible; for if he failed in his promiſe, or his renunciation was ſo late as to prevent the buſineſs from being properly executed, he was liable to an action, as he was if any damage enſued by the non-performance of a promiſe to become a depoſitary. We have now done with nominate contracts, and ſhall proceed to thoſe which did not come under any of theſe ſpecific claſſes, but were called by the name of innominate, for reaſons which have been or ſhall be mentioned.

INNOMINATE CONTRACTS.

Contracts which aroſe from the expreſs agreement of the parties (for ſuppoſed agreements produced merely by implication, were but *quaſi* contracts) but to which agreements no ſpecific name was given by the law, were therefore called innominate. Theſe were ſuch in which the compenſation for the uſe of a thing, or for labour and attention, was not pecuniary; but either, 1. the reciprocal uſe, or the gift of ſome other thing, which claſs was vulgarly called *Do ut Des*; or 2. work and pains reciprocally undertaken, vulgarly called *Facio ut Facias*; or 3. the uſe or

(74) D. 17. 1. 12.

gift of another thing in conſideration of care, or labour, and converſely, *i. e. do ut facias*, and *facio ut des*. They were ranked into claſſes, therefore, by the conſiderations, by the thing given or done to induce the obligation; the reaſon is evident, becauſe as their claſſes or diviſions could not, like thoſe of nominate contracts, be deſcriptive of the ways in which they were formed, (inaſmuch as theſe ways might be infinite), there was no other method of arrangement but by the conſiderations which produced them.

To illuſtrate the nature of theſe contracts ſtill further, let us take the inſtance of exchange. A. lends his horſe to B. to work in the field of B. on condition of having the labour of B.'s horſe in his own, this is in the claſs of *do ut des*; it is not a *mutuum*, the horſe being an animal intended only for uſe, not for conſumption; it is not a *commodatum*, for there is a compenſation; it is not a *locatio*, for that compenſation is not pecuniary; it is then the innominate contract, ranked from its conſideration under the claſs of *do ut des*; for as ten thouſand different inſtances may be imagined of theſe double bailments, they are not included under any nominate contract (75):

(75) It is not meant, that theſe conſiderations are not found in nominate contracts: the inſtances which Mr. Blackſtone gives of them, are of nominate contracts. In the contract of ſale, the conſideration is, *do ut des*: in the contract of hiring our perſonal labour, it is *facio ut des*; but the thing given then is money, and there was no occaſion

if a maſon or a carpenter are each of them about to build a houſe, and agree that one ſhould finiſh the maſon work, the other the wood work, in their reſpective buildings, it is claſſed under *facio ut facias*; if a man contracted to give a parcel of plate or books, in conſideration of another manumitting a ſlave, it was *do ut facias*; if a carpenter undertook to build a houſe for a maſon, on condition that the latter ſhould give him not money, but a great quantity of mortar or brick, or other building materials, *fecit ut daret alter.*

As the infinite variety of agreements which might thus ariſe among men could not be foreſeen or provided for, as ſettled ſpecific forms of actions could not be previouſly prepared applicable to every caſe, the violation of an innominate contract was to be remedied by an action *ex præſcriptis verbis*, formed in language applicable to the particular circumſtances and called alſo *actio in factum*, or on the caſe (76).

The ſame vigilance and care was requiſite in innominate contracts, as in nominate, according to the caſe.

QUASI CONTRACTS.

Obligations quaſi ex contractu (77), called alſo improper contracts, aroſe by implication from cir-

in deſcribing them to introduce the conſiderations, they having ſpecific names; but in innominate contracts, there is no other mode of deſcription poſſible.

(76) From ſimilar cauſes our actions on the caſe came into uſe.

(77) Familiar to us under the name of implied contracts, or aſſumpſits.

cumſtances without expreſs or direct agreement; the firſt noticed by the Inſtitutes was *ex negotiorum geſtione*, when one perſon aſſumed the care of the affairs of another without mandate in his abſence, and without his knowledge. The abſent perſon was obliged to approve of what was well done, to indemnify the agent to execute his promiſe, and reimburſe his expences, if the undertaking was neceſſary; if the undertaking was unneceſſary, any loſs fell upon the buſy intermeddler (78), who at all events, as he interpoſed his ſervices without being aſked, was obliged to uſe the moſt exact diligence.

The next was *tutelæ adminiſtratio*, by which the tutor was impliedly bound, though there was no expreſs agreement between him and the pupil.

The obligations of joint-tenants to conſent to partition, and of the heir to pay a legacy, were eſpecially enumerated among quaſi contracts. But the obligation to repay money, which had been paid by miſtake, or in error, which gave right to the action called *condictio indebiti* (79), is much the moſt conſpicuous in this chapter of the Inſtitutes.

(78) Dig. 50. 17. 36. Quere in theſe countries, if a man, without any order, intermeddle with the affairs of another, though to his advantage, could he have an action for his coſts? I have known the caſe warmly conteſted in a court of juſtice, but it did not come to a deciſion.

(79) Anſwering to our action for money had and received.

The Inſtitutes having treated of the ſeveral ſpecies of contracts, terminate the third book, with an account of the perſons through whom obligations might be contracted, and the manner in which they might be diſſolved. But they dwell merely on the rights accruing to the father or maſter, from the contract of the ſon or the ſlave, and do not mention any counter obligation which could fall upon him through their contracts. In fact none could, any more than from the contracts of the wife; their contracts did not bind him, nor their promiſes, but promiſes to them reſulted to him (80).

Obligations, whether ariſing from proper or improper contracts, might be diſſolved by ways infinite in number, *e. g.* exceptione, teſtamento, pacto, ſententia, jurejurando, tempore, *by plea in bar, by bequeſt, by releaſe or counter bargain, by decree, by abſolving oath, by length of time.* The Inſtitutes, however, treat only of ſuch ſolutions as ariſe by mere operation of law, and among them ſelect only the moſt remarkable: theſe were by payment; by *acceptilation*, which was a releaſe without payment, where the creditor in ſolemn form of words admitted the payment of a debt which in fact he had never received; by *novation*, which was changing the nature of

(80) Whatever the wife earns during coverture belongs to the huſband. Salk. 114, the caſe of the ſlave cannot occur with us, and of the ſon is quite diſſimilar.

the debt, as from a book debt to a bond debt, or changing the perſon of the debtor; *mutuo conſenſu*, when all the parties by agreement receded from an obligation not yet completed; this was peculiar to contracts by conſent, or thoſe called, as above, conſenſual. To theſe we muſt add ſome other remarkable modes, viz. legal tender, called *oblatio; compenſatio*, which anſwered to our ſet off (81); and *confuſio*, when the obligation of the debtor and right of the creditor united in the ſame perſon.

I ſhall conclude with one or two general rules applicable to all contracts.

All parts of the contract ought to be explained the one by the other, and regard had to the preamble of it (82).

The intention ought to be followed rather than the words, and ſenſeleſs words were to be rejected (83).

The interpretation of the contract ought to lean in favour of the obligor (84).

In all contracts, where no day of performance is added, the performance ought to be immediately (85).

(81) *As with us*, the debts ſet off muſt have been of the ſame kind, or due in the ſame right; and ſet offs could be only in contracts, not in torts.

(82) D. 46. 1. 134. 1.

(83) D. 50. 17. 32 & 92. and 73. 3.

(84) D. 45. 1. 38. 18. (85) D. 50. 17. 4.

He that is to pay, or deliver, is in no delay till after the laſt moment of the term appointed (86).

Contracts are to be adjudged according to the law of the place where the contracts were made (87).

I have now completed my intention of giving a curſory view of the civil law, as treating of the rights of perſons and of things. In the next book I ſhall proceed to conſider public and pri-

(86) Inſt. 3. 16. 2.

(87) This rule is not *directly* taken from the Roman law, which, it has been juſtly ſaid, enjoying univerſal empire, had no occaſion to provide for the caſe, but it has been extracted collaterally from that ſyſtem by great and ingenious writers, and particularly by Huberus, who is above all others on this ſubject to be recommended to the reader's peruſal, and not merely to the theoretic reader, but to the man actually engaged in practice. In a mercantile nation, caſes governed by this rule muſt daily occur.

To this general rule there are ſome exceptions:

Firſt. If the parties in making the contract regarded the law of another country.

Secondly. According to Huberus and others, if it violates the rights of perſons not parties to it; as the marriage of a minor abroad, with a view of avoiding a ſtatute at home.

Thirdly. It does not apply to immoveable property.

Contracts in which aliens are concerned, are between alien and citizen, or between two aliens, and may have been made here or abroad; in all ſuch caſes, I conceive, the cauſe of action being tranſitory, ſuit may be brought abroad or here.

vate wrongs, and their remedies. Before I conclude, let me again remind the reader of what has been said in the preface, that my object has not been to give a full and minute knowledge of the civil law, but to select the most useful and prominent parts, and to comprize them within a moderate compass, proportionate to the inferior importance of this study, in the present day, to that of the common law, in the common law forum. If deeper knowledge be desired, the books and titles of the civil law, containing the material information relative to each subject, have been mentioned and pointed out, each in its proper place.

Though I admit that the importance of information in the civil law to the common lawyer is comparatively small, I must ever insist that its utility to the lawyer, as well as the advocate, is positively great. The civil law, (says an eminent author) as a system of jurisprudence framed by wise men, and approved by the experience of many ages, must, in every age and every country, furnish principles which, modified and applied as the altered circumstances of the times may require, will greatly contribute to the real interests and advantages of society; and though in courting praises to its civil provisions, I have been willing to sacrifice the character of its criminal code, we are in justice requ[redacted] to attend to those palliatives, which it every[redacted]re introduces to soften its arbitrary maxims, and when it glori-

ouſly exclaims, " Licet lex Imperii ſolennibus " juris imperatorem ſolverit, nihil tamen tam " proprium Imperii eſt quam legibus vivere (88)," we muſt admit, that its practice mellowed its theory, and that its language reprobated the abuſe of its principle.

(88) Code, lib. 6. tit. 23. 3.

ON WRONGS AND THEIR REMEDIES.

The reader muſt ever be reminded, that this ſhort, but I hope careful ſelection and abridgment, profeſſes only to convey to the common lawyer the general outline of the civil law, and not to inſert any thing ſuperfluous, or to the preſent day unintereſting. It follows, that the Roman criminal law cannot take up long conſideration.

De publicis judiciis ſummo digito et quaſi per indicem tetigimus; diligentior eorum ſcientia ex latioribus pandectarum libris adventurâ eſt.

Concluſio Inſtitutorum.

ON THE CIVIL LAW.

BOOK III.

ON WRONGS AND THEIR REMEDIES

CHAPTER I.

ON PRIVATE WRONGS.

THE clear method purſued by the framers of the civil law, is not leaſt conſpicuous in treating of private wrongs. Yet here the reader muſt not be ſurprized to find many things treated of and conſidered as private wrongs, and the ſubjects of civil actions, which we have been accuſtomed to conſider only in a criminal light. Thus theft and robbery, though they did not in the latter times of the empire paſs with impunity from the hand of public juſtice, were for a long time conſidered as matters not immediately relating to the public, and to be compenſated by private

reparation (1). And even after they became the objects of criminal law, a civil action ſtill remained in the power of the injured party. Under the general name however of theft, were included many deeds, which with us would not bear the name, but would rather be called *converſions*, and the ſubjects of an action of *trover*.

We will therefore (reſerving the criminal view of wrongs for the next chapter) conſider now the diviſion of private wrongs made by the Inſtitutes, together with the ſatisfaction to be made for each of them reſpectively to the offended party.

(1) At firſt at Rome, by the twelve tables, theft was puniſhed criminally. Afterwards, during many ages, it was not puniſhed criminally; in Juſtinian's time it was, but not capitally. Draco puniſhed it capitally.—The Jewiſh laws, and Solon pecuniarily.

It has been doubted by able men, and is a queſtion for humanity and ſound policy, whether theft, or even robbery, unaccompanied with death or wound, ought to be puniſhable with death. I will not with Sir W. Blackſtone ſay, (for which he has been warmly cenſured by Dr. Chriſtian), that theft is only a violation of ſocial rights, and not of natural; but it is my humble opinion, that to puniſh it with death, is neither neceſſary in ſociety, nor agreeable to the will of God; were it not for the pious ſubterfuges of juries, and the humanity that prevents the law from being literally executed, which ſeldom is ſuffered to fall on any but hardened and old offenders, we ſhould ſhudder at our code; though it muſt be acknowledged, that later ſtatutes have alleviated the puniſhment of firſt offences and ſmaller thefts.

Obligations, or rights ariſing to the injured party from the torts or wrongs done by another, were divided into thoſe ariſing *ex delicto*, and thoſe *quaſi ex delicto*—from *torts*, and *quaſi torts*; and offences were accordingly partitioned into proper and improper.

Torts or wrongs, *properly* ſo called, as diſtinguiſhed from quaſi torts, were claſſed under four heads—*Theft*, *Robbery*, *Damage*, and *Injury*—meaning by the firſt, abduction or converſion of property without force;—by the ſecond, that attended with force;—by the third, damage done to property without taking away the thing damaged, or deriving benefit to the owner;—by the laſt, injury to the perſon or character of a free man.

Theft was defined *contrectatio fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessionisve.*

THEFT.

Theft was divided into manifeſt, and not manifeſt; the firſt being when the perſon was actually caught in the fact (2), or was diſcovered with the property in his hands before he reached his deſtination; the diſtinction was important, becauſe the damages or penalty varied, being in the one caſe fourfold of the property taken, in that of not manifeſt theft, only double.

(2) Quem Græci ἐπ αυτο φωρῳ appellant. Inſt.

It has been obſerved, that in many caſes, theft anſwered rather to what we would call converſion, and accordingly the Inſtitutes eſtabliſh a rule, that every intermeddling with, or uſing another man's property againſt the will of the owner, is *furtum* (3).

The action and remedies for theft were reaſonably extended to the aiders and abetters, but not to the mere adviſer. The ſon and the ſlave, if they committed depredation on the property of thoſe in whoſe power they were, committed theft, but not remediable by action, ſince no action could lie between the parties: and yet it was ſo far theft, that as in all other caſes of furtum, if the property thus by them taken was handed over to another, the new poſſeſſor could make no title to it by preſcription, nor could any poſſeſſor *malæ fidei*, ſupport an action for the thing or its value.

The *actio furti* was given to the perſon having an intereſt, although not the abſolute proprietor, as to the pawnee, who, as the Inſtitutes obſerve, might rather chooſe to bring ſuch an action of trover for the *thing*, than to proceed merely

(3) Inſt. lib. 4. tit. 4. Furtum autem eſt non ſolum cum quis intercipiendi cauſa rem alienam amovet; ſed generaliter cum quis alienam rem invito domino contrectat. Itaque ſive creditor pignore, ſive is apud quem res depoſita eſt, ea re utatur—ſive is qui rem utendam acceperit, in alium uſum eam transferat, quam cujus gratia ei data eſt, furtum commitit.

againſt the *perſon*; and thus the taylor or the dyer, who miſſed the goods committed to his care, could maintain this action, and not the owner, whoſe remedy lay over againſt his tradeſman by an *actio locati* (4).

A buyer had not this action before delivery, ſo that previous poſſeſſion ſeems to have been neceſſary to maintain this action.

If there were divers perſons concerned, they all were liable but to one and the ſame pecuniary penalty amongſt them; yet any one of them might be ſued for the whole, which diſcharged the reſt *civiliter* (5).

The *actio furti* did not lie againſt the heir of the wrong doer, as being a penal action *ex maleficio* (6).

(4) It differed therefore from our action of trover, in which property is neceſſary in the plaintiff; and from our action of detinue, inaſmuch as the thing itſelf could not be recovered, but damages for the loſs of it; if the thing itſelf was to be recovered, the proprietor brought an action *vindicando* againſt the poſſeſſor; if the poſſeſſion had paſſed to another, then againſt the original wrong doer *condicendo*. *Rei* enim furtivæ perſecutio ſoli domino competit, ſive de rei vindicatione quæritur, ſive de condictione furtiva.

(5) On a ſimilar principle, by our law, torts may be ſeparated, but not contracts.

(6) Thus with us, wherever the cauſe of action is really a *delictum*, it doth not ſurvive againſt the executor. Where it is not ſo, ſome action ſurvives, but not ſuch an one as in its form of pleading ſounds to be *ex delicto*, vid. Hambly and Trott. Cowper, 375.

OF RAPINE, OR ROBBERY.

This tort is here alſo conſidered for the preſent merely in a civil light, and is diſtinguiſhed from ſimple theft by the eſſential concomitant of force: it could be only of things moveable, and the offence included in its definition malice of mind and wicked intention, and therefore could not extend to the miſtaken claimant of his ſuppoſed property.

If, however, a man took by force his real or imaginary property he did not go unpuniſhed, for in the firſt caſe he forfeited the goods, in the latter was ſubject to damages in double the value; for force was by the law abhorred (7).

The remedy for this violent detraction was originally by the *actio furti:* but the prætors added two ſpecial remedies by the action *de vibonorum raptorum*, and *damni illati*, in the former of which the plaintiff ſued for fourfold damages, in the latter for double.

Theſe actions, like the *actio furti*, were maintainable by any perſon having an intereſt, without abſolute property, as by a mortgagee, or an uſufructuary; and altogether the ſame principles

(7) Thus ours, and all wiſe laws, generally prohibit force to the injured, and directed him to appeal to juſtice, to avoid the numberleſs evils which muſt enſue from what is vulgarly called taking the law into a man's own hands, with all the paſſionate fruits ariſing from ſuch heated intervention.

which directed who could bring the firſt-mentioned action, governed this alſo.

OF DAMAGE.

By injury, the Roman law meant offence againſt the perſon. By damage, againſt the property or eſtate, whether that conſiſted in lands, goods, or any other property. In this general acceptation, it includes both theft and robbery, but is more particularly applied to the deſtroying, ſpoiling, or deterioration of the thing, without actually taking it away, or deriving advantage to the offender.

Faultineſs, or injuſtice, were included in the idea of damage; thus the accidental wound inflicted on a ſlave by the ſhooter of an arrow, or the rider of a runaway horſe, gave no action to the maſter, if the former event happened in a place uſually devoted to ſuch exerciſes, or the latter did not ariſe from want of ſkill (8); but the ſoldier who ſhot his dart in an unaccuſtomed ſpot, the unſkilful rider who mounted an unmanageable horſe, or the unſklful phyſician (9) who attempted the cure of a domeſtic, were juſtly anſwerable for the conſequences to the owner of an injured ſlave, who might not only

(8) Killing at a tournament was not damnum.

(9) Plinius alicubi ſcribit, ſoli medico hominem occidere impune eſſe.

bring his civil action, but alſo profecute criminally (10).

The ſpecial remedies for damage done were given by the Aquilian law, which in its firſt chapter ordained, that he who injurioufly killed the bondman or cattle of another, ſhould pay the lord or owner for damage ſo much money as had been made from their ſervice during the year preceding; and by its third (11), provided remedies for damage done alſo to inanimate things.

The action being of a penal nature, the value of the thing damaged was taken at its higheſt rate at any period of the year preceding, and every incident was taken into conſideration, as if one out of a well-matched pair of horſes was killed, the injured party was to be additionally recompenſed in damages for the diminution in the others value; and on the ſame principle the action could not be maintained againſt the heir of him who did the damage, unleſs ſuch heir was enriched by the damage.

Though the damage was not done by a perſon,

(10) We may here ſee plainly the Roman diſtinction between damage and injury. The freeman wounded had not a *direct* action from thence, becauſe a man could not ſay that his eſtate was *directly* diminiſhed by ſuch wound, but by equity and interpretation of law he might be relieved for the loſs of his time, and the charge of his cure, for by theſe means his *fortune* has been impaired.

(11) The ſecond, which the Triſtitious were publiſhed, had fallen into diſuſe.

but by a thing, e. g. a ſlave or a quadruped (12), the owner of that thing was liable in damages; and if more perſons than one were concerned in its perpetration, ſo penal was the action, that each appears to have been liable by law to pay the whole recompence, and payment by one did not diſcharge his companion (13).

We have hitherto ſpoken of damage done, but it may be alſo neceſſary to provide againſt damage feared from a thing to be done, or ſuch as is apprehended from a thing now done, or from a work actually erected.

The former inlet to wrong was guarded by an edict of the Prætor, called *Nunciatio novi operis*; —the latter by an action de *damno infecto*, or where all other remedies failed, by prætorian aid, and a remedy in equity, ſtiled an interdict, which may be juſtly tranſlated an *injunction*; but theſe things are more properly placed under the head of improper offences, or *quaſi torts*.

OF INJURY.

Injury, when uſed in a ſpecific ſenſe by the Roman law, includes the idea of contumely, and

(12) The action was in this caſe called by the quaint name of the action *ſi quadrupes pauperiem fecerit*, for pauperies was here defined damnum ſine injuria facientis datum.

(13) See Dig. 9. 2. 11. 2. From another paſſage in the Pandects, it ſhould ſeem, that this action would lie againſt a judge or magiſtrate acting againſt law and juſtice. See Dig. 9. 2. 29.

might be committed by deed, as assault or battery; or by word or writing defamatory and libellous.

Injuries by deed were distinguished into such as were atrocious, and such as were not.

Atrocious injuries were so deemed from the degree of the violence, as the wound, mayhem, or assault, were more or less desperate—from the *locus in quo*, as if done in the forum, the theatre, or in the presence of the court,—or in respect to the person as committed on a senator, a magistrate, or a patron. These circumstances it was necessary to point out in the libel, and also to state that no reconciliation or remission had subsequently taken place, which would put an end to all penal actions, though not to those of mere reparation.

An action might be brought not only for an injury done to the plaintiff himself, but also to those under his power, as his daughter or wife. With respect to his slave, indeed, the action did not lay, if he had been merely affronted, or even contumeliously struck; the assault must have been atrocious. The free servant must sue in his own name (14).

The legal remedy for an injury to a married daughter might be sought not only by her father, but by herself and her husband; the wife was not allowed to sue for wrongs committed on her

(14) This is almost the only mention I have met of free menial servants at Rome. Inst. lib. 4. tit. 4.

conſort. Even the attempt to ſolicit the chaſtity of a modeſt and virtuous woman, was the ſubject of an action.

The twelve tables for a limb broken or disfigured, eſtabliſhed the rude law of retaliation—and for ſmaller injuries fixed ſmall pecuniary mulcts, agreeable to the barbarous ſimplicity of the times.

Greater civilization introduced decrees for damages really proportioned to the degree of the injury, to be eſtimated in the firſt inſtance by the feeling of the party, whoſe reſentments were moderated by the final diſcretion of the prætor. And the Cornelian law introduced a particular form of action, in the caſes of aſſault, battery, or forcible entry.

In conſidering verbal injuries, the law was not inattentive to the diſcrimination of what words ſhould be deemed actionable, and what not. To call a man traitor, uſurer, forger, baſtard, bankrupt, was particularly penal—and without entering into a tireſome and uſeleſs detail, I ſhall only obſerve, that affected or ironical compliment was not permitted to ſcreen the defamer (15).

But upon injuries by writing, or libels, the civil law is moſt particularly ſevere.

The perſon who framed—who wrote down,—who read to others or publiſhed, or who adviſedly

(15) E. G. Tu es bonus homo, which at Rome conveyed the hidden meaning of Cornutus.

bought or ſold an infamous libel, was ſubject to the penalties of the law.

Theſe penalties were, if the injured party proceeded civiliter, beſides damages, incapacity of teſtation, ſo that the libeller could neither be a witneſs nor make a will; if he proceeded criminaliter, the puniſhment or conviction was death; and ſuch was the ſeverity of the law, that it extended its vengeance not only to the framer, but to him who omitted to deſtroy it when it was in his power (16).

QUASI TORTS.

Of improper offences, treſpaſſes, or *quaſi delicta*, which might be committed without malice or ill deſign, the firſt enumerated is one unknown to us, the judicial pronunciation of an erroneous ſentence (17). If the judge pronounced a wrong

(16) Code 9. 36. This however muſt be underſtood to mean only in the caſe of very deſperate libels indeed, and I apprehend only took place when the libel charged the abuſed with a capital offence. Nor was this the law in any caſe during the Auguſtine age and more poliſhed times of Rome, but only in the early æra of the riſing republic, and later periods of the declining empire, the ſeverity of the law being reſtored by Valentinian.

The ſame diſtinction ſeems to have been made as with us, as to allowing the party to plead the truth of the charge in a civil, but not in a criminal ſuit.

(17) Bracton, however, ſays, that before his time, judges had made the ſuit their own by giving an erroneous judgment.

judgment from corrupt motives, he was rendered infamous, and condemned in the whole value of the ſuit with coſts, ſuperadded to a fine adequate to triple his inducement, if he had received a bribe. If the ſentence had been in a criminal caſe, baniſhment and confiſcation was his lot. But we ſpeak at preſent of error through unſkilfulneſs, without corrupt motive or intention. In ſuch an inſtance, the judge was ſaid *litem ſuam facere*, i. e. he was now conſidered as party to the action, and liable to the payment of what the injured ſuitor ought to have recovered, a puniſhment deemed to be juſt, ſince he ought not to have taken an office for which he ſhould have been conſcious he was unqualified through want of ſcientific knowledge;—but as he acted without fraud or deſign, it was not a *direct tort* or *proper* offence, but only an indirect *fault* and *quaſi delictum*. Theſe regulations, in future ages, gave way to the more obvious and rational method of correcting the errors of an inferior, by appeal to a ſuperior tribunal.

The next kind of treſpaſs which the civil law ſpecially dwells upon, is the careleſs throwing or pouring down, (though without miſchievous deſign) of any thing whereby damage is occaſioned to the perſon, goods, or clothes; and here it is minute in aſcertaining whether the owner of the houſe, or his tenant inhabiting therein, or the occaſional ſojourner, or the immediate agent, where many dwell in the ſame houſe, ſhall be

liable to the penalty recoverable for the negligent precipitation of the inſtrument of miſchief. This penalty, if damage was done only to the property, was double the eſtimate of the damage done. If the perſon was injured, the penalty of accidental homicide was aſcertained by law at fifty *aurei*, that of wounding was left to the diſcretion of the judices; but the law was extremely liberal in valuing the loſt time and labour of the man who was thus perpetually rendered unable to work, ſince it eſtimated his life at an hundred years, the utmoſt extent of probability.

The Inſtitutes next conſider a ſubject to us very familiar, and the foundation of many an action. The want of care in perſons employed by the owner or maſter of a ſhip,—or the keeper of an inn, as to the goods and property committed to the charge of their employers. The maſter not having entered into any direct contract, an action *ex contractu* did not lie againſt him, and not having been himſelf immediately and perſonally in fault, an action of *tort*, or *ex maleficio*, could not be ſupported, and he therefore was proceeded againſt as guilty of a *quaſi tort*, and being liable *quaſi ex maleficio*.

Though no one could be compelled to keep a houſe of entertainment, yet the hoſt who profeſſed to keep a public houſe for travellers was obliged to receive all gueſts that came, provided he had room. If the gueſt delivered his box or caſket to the innkeeper cloſed and ſealed, or

locked up, without mentioning the contents, and afterwards complained of ſpoliation, if the box was returned to him in the ſame ſtate, without any appearance upon it to induce ſuſpicion of fraud, his oath could not be admitted as to the contents, as it might if it was reſtored broken or unlocked; but he ſeems to have been allowed to prove the contents by the teſtimony of others, and ſo to render the innkeeper liable. And in general, if any theft was committed in a ſhip, inn, or ſtable, the owner or maſter was liable, and the gueſt had his choice of one of three actions.

The firſt was a prætorian action for double damage, where the crew of the ſhip, or the ſervants of the inn, had ſtolen the goods (18). The ſecond an action of theft, which extended to the caſe of its being committed even by a ſtranger; the third was called an action *de recepto*, which was not viewed in the light of a penal action, and was to recover only ſimple damages, and therefore extended even to the heir of the ſpoiler. The party, beſides theſe ſpecial actions, might alſo have a general action *de depoſito*—but then in this general action, the party was only anſwerable for fraud or groſs neg-

(18) In poteſtate ſit ejus cui res ſubrepta ſit utrum mallet cum exercitore honorario jure, an cum fure jure civili experiri. Dig. 47. 5.

ligence, whereas in a ſpecial action he was accountable for the ſlighteſt fault (19).

Quaſi torts, being of infinite variety, to enumerate them all is impoſſible, and therefore the civil law merely dwells upon ſome of thoſe moſt prominent, as to which I believe its deciſions will be found nearly analogous to ours.

(19) For theſe diſtinctions, ſee the chapter on Contracts above.

CHAPTER II.

OF PUBLIC WRONGS.

THE light in which crimes have appeared to different legiſlators, and the puniſhments by various judicatures thought meet and proportioned to the degrees of offences, are inſtructive to the ſenate, and intereſting to the people. The proviſions of Rome, in its more enlightened and moderate times, may perhaps appear more reaſonable and leſs ſanguinary than our own (1).

Offences againſt God and religion are particularly the ſubject of the 77th Nov. whoſe title is

(1) In the progreſs of the republic, the penal laws ſoftened in their rigour—with us the converſe ſeems to have been the caſe, by the perpetual acervation of new ſtatutes taking away the benefits of clergy. In matters of private concern, the humanity of judges and juries makes the ſeverity of the laws leſs felt; but in matters of ſtate, what a horrid picture of cruelty and injuſtice, of corrupt and time-ſerving judges, the ermined inſtruments of legal murther, do the ſtate trials of the laſt and its preceding century exhibit!

ut non luxurientur homines contra naturam neque blaſphemetur in Deum, and it provides that hardened and obdurate offenders ſhall be puniſhed with death, and enjoins attention to its mandates, by the ſtricteſt injunctions to the magiſtrates under pain of the Divine diſpleaſure, and, in this world, of the Imperial indignation.

Apoſtacy from Chriſtianity to Judaiſm, Paganiſm, or other falſe religion, was puniſhed by Conſtantius with confiſcation of goods; and if the apoſtate endeavoured to pervert others, the emperors Theodoſius and Valentinian added capital puniſhment. And hereſy was often the prelude to death, as in the inſtance of the Manicheans under Theodoſius and Juſtinian (2).

Though blaſphemy, as we have obſerved, was ſo ſeverely puniſhed, common curſing and ſwearing ſeems to have been left to the tribunal of Heaven, for, ſaith the Code, 4. 1. 2. *Jurisjurandi contempta religio ſatis Deum ultorem habet*, meaning the offence of common ſwearing in common converſation, and not deliberate perjury as to a ſpecific fact, which ſeems to have been puniſhable, even though committed out of a court of juſtice (3).

(2) We have before obſerved ſome legal incapacities of heretics, ſuch as the incapacity of teſtation.

(3) See Dig. 12. 2. 13. 6. Si quis Juraverit dare ſe non oportere, & perjeraverit, fuſtibus eum caſtigandum reſcribit Imperator.

The abſurd charge of witchcraft, to the reproach of human reaſon, was liſtened to by the civil, as by moſt other laws. The wizard and his conſulter were both puniſhable with death, but the laughable wiſdom of Conſtantine was inclined to compromiſe the matter, and to allow magic if exerted for a good purpoſe.

Of acts of toleration, or of penal ſtatutes for deviations in diſcipline or ceremonies, little or nothing is ſaid, though any affront to the eſtabliſhed religious ceremonies of the ſtate was avenged, like any other breach of order. But indeed the penal ſtatutes form ſo ſmall a part of the Code and Pandects, that detail cannot be looked for, and from the ſame cauſe we are at a loſs to trace the particular proviſions againſt drunkenneſs, frequenting of brothels, and ſuch like offences.

It ſeems, indeed, that for licenced fornication, the civil law aſſigned no puniſhment, and a woman was allowed openly to follow the profeſſion of an harlot, after having obtained a licence for it from the grave Ædiles, the miſerable trade being thought a ſufficient puniſhment for itſelf (4). Thus Tacitus ſays, Annal. 2. 88. *Victilia, Prætoria familia genita, licentiam ſtupri apud Ædiles vulgaverat, more inter veteres recepto, qui ſatis pœnarum adverſus impudicas in ipſa profeſſione flagitii credebant.* But if any one preſumed to

(4) Heinec. Antiq. lib. 4. tit. 18. Something of this kind took place in Holland, as to their *ſpiel* or dancing-houſes.

exercise this trade without leave of the magistrate, they might be fined or driven into banishment. And he who prostituted his wife or daughter for gain, was punishable even with death (5).

The emperors, apparently more anxious to vindicate their own dignity, than to avenge the affronted Majesty of heaven, have been much more prolix in their provisions against treason, than against irreligion. This formidable crime, divided from early times into *perduellio*, or direct acts done against the personal safety of the prince, and *læsa majestas*, whatever was attempted indirectly against the dignity and prerogative of the republic or prince. To attempt the emperor's life is an instance of the first; to pretend to coin the money sanctioned by his stamp and image, of the second. Both were guarded against by a number of successive laws, till they all finally merged in the great statute of treasons, called the Lex Julia Majestatis.

This Julian law was twofold, the former introduced by Julius Cæsar, interdicting from fire and water those guilty of treason—the latter the work of Augustus, which pronounced all persons guilty of treason who attempted any thing in violation of the *majestas* or sovereign authority of the state, or of the prince, whether by act or writing, a law which, however severe, was still further aggravated by Tiberius, who extended its

(5) Nov. 14.

penalties even to words: nay, ſo outrageous were its proviſions, as to include thoſe who ſhewed any diſreſpect to the ſtatue or effigies of the prince, even to the ridiculous exceſs of noticing the giddy profligate who happened to bear into the ſtews a ring ſtamped with the Imperial image (6).

The eagerneſs of tyrants to detect treaſon occaſioned the moſt extravagant violation of all principles, in the mode of inveſtigating its ſecret machinations. Perſons of the moſt notoriouſly infamous characters, and rendered by their infamy (7) legally incompetent to give evidence in any other caſe, were admitted to prove the higheſt of crimes. Women, ſoldiers, ſlaves, thoſe in a ſtate of pupillage, freedmen, perſons of every order and degree, were gladly received as accuſers againſt the unfortunate, and, perhaps, innocent. On every ſide the ſword hung by a thread near the heads of all the ſubjects of the ſtate, and to uſe the words of the Engliſh parliament in the reign of Henry IV. no man knew how to behave himſelf for doubt of the pains of treaſon.

The ſame dreadful eagerneſs to protect a government, whoſe greateſt ſafety ſhould ever be in

(6) If, however, a man accidentally hit the emperor's ſtatue with a ſtone, or hammer his old buſt in repairing it, he is not guilty of treaſon, ſay moſt gravely the Pandects.

(7) Dig. 48. 4. 7. Qui ſtipendium merebant accuſare non poterant. Heineccius, lib. 4. tit. 18.

the goodwill and affection of its ſubjects, broke through every tender tie of human nature to reach the real or ſuppoſed criminal. The ſon was bound to impeach the father, the wife the huſband, the friend the participator of his heart, the obliged his benefactor; for all private relations and domeſtic affections were to bow before the welfare of the ſtate, or poſſibly the ſecurity of a tyrant.

Yet their law of treaſons was in ſome inſtances more indulgent than ours. To conſpire the death of the queen is treaſon with us, not ſo of the empreſs with them (8). The wives of traitors did not ſuffer from their treaſon, and were capable of retaining their dower (9); and the father, the daughter, and the grandſons, were ſcreened from the forfeitures which affected immediate male deſcendants.

Railing words againſt the emperor were, as with us, a high miſdemeanor, but not treaſon (10);

(8) D. 1. 3. 31. I here follow the opinion of Wood, though I do not ſee how it follows from the authority quoted by him, which is, *Princeps legibus ſolutus eſt, Auguſta autem legibus ſoluta non eſt. Principes tamen eadem illi privilegia tribuunt quæ ipſi habent.* This proves her indeed to be a ſubject, but ſo is our queen a ſubject.

(9) C. 9. 8. 5. 5. With us the wife forfeits her dower for the treaſon of her huſband, but not her jointure.

(10) Every one knows the two old remarkable reprobated inſtances of capital puniſhment for words in the reign of Edward IV.

and the ſame rational principle in both laws directed, that a wiſh or endeavour to commit treaſon muſt amount to ſome overt act, or be manifeſted thereby—that the imagination and ſtruggle of the mind muſt be demonſtrated by ſome open act.

The penalty of treaſon was the death of the traitor, deſtruction of his ſtatues and buſts (11), confiſcation of all his eſtates, and vacating of all alienations of his property ſince the commiſſion of his crime. His ſons too were rendered incapable of taking by will, or of inheriting by deſcent from any anceſtor or collateral (12).

If the traitor was ſummoned and would not appear, but abſconded at the end of a year from the time of the citation, he was pronounced contumacious, and his eſtate confiſcated (13). And

(11) Statuas detrahendas, D. 48. 19. 24. which Wood tranſlates with a careleſſneſs not quite unuſual with him, deſtruction of his coat of arms, as if the Romans had armorial bearings.

(12) Corruption of blood is generally ſpoken of as a creature of the feodal ſyſtem, yet here a ſpecies of it appears to have taken place, though not exactly ſimilar to ours.

(13) This then was thought a reaſonable exception to that noble ſentiment which is breathed by the fifth title of the nineteenth book of the Pandects. "*Abſentem* in crimi-" nibus damnari non debere, Divus Trajanus, Julio Fron-" toni reſcribit, ſed nec de *ſuſpicionibus* debere aliquem " damnari, Divus Trajanus Adſiduo Severo reſcribit, ſatius " enim eſſe impunitum relinqui facinus nocentis, (our law " ſays of a thouſand) quam innocentem damnari."

even after the death of the criminal, a profecution might be commenced in order to obtain a decree appropriating his eſtate to the exchequer and the public funds, that the means which he living would have uſed to the deſtruction of the ſtate, might, while he lay torpid in the grave, be applied to its benefit.

From the crime of treaſon, the eye of the avenging law ſeems to have turned more immediately, and more earneſtly, to that of adultery than any other, and even antecedently to the conſideration of the more horrid one of homicide. In early times the horror of an unuſual offence, in later the indignation at its frequency, may account for this particular attention.

Adultery was the carnal knowledge of another man's wife (14), knowing her to be ſo (15); ſo that a married man who lay with a ſingle woman was not guilty of that crime, but of the crime called *ſtuprum*, if ſuch ſingle or unmarried woman was not a common proſtitute (16).

The puniſhment of adultery was death to the man, (and this extended to the debaucher of a woman even betrothed to another) to the woman

(14) If committed by a married man with a married woman, the canon laws calls it double adultery.

(15) For without ſuch knowledge it was not legal adultery.

(16) I have ſo explained ſtuprum from the Pandects, vol. 4. chap. 33. Yet in the paſſage of Tacitus, lately mentioned, it means common proſtitution, and Tacitus was a lawyer.

(17) ſcourging, loſs of dower, and confinement in a monaſtery, with liberty however to the huſband to take her out and return her to his bed, if he thought fit, within two years, which if he did not, ſhe was obliged to take the perpetual vows (18).

As the crime was ſo ſeverely puniſhed by the law, vengeance was not left in the hand of the party (19), except he detected the offender in the

(17) Her freedom from the pains of death for this crime, is aſcribed to the ſelf-indulgent part of theſe ordinances really proceeding from the abandoned empreſs Theodora, the wife of Juſtinian, though ſanctioned by his name.

(18) The puniſhment of death, Heineccius inſiſts, was not inflicted in the time of Auguſtus, of the effect of whoſe law on this head Horace thus boaſts:

Nullis polluitur caſta domus ſtupris, and thinks he knows better than Tribonian, who ſays it did; and as a proof of it, quotes authorities to ſhew, that the "lex julia de adulterio damnatas lege uxores duci vetat, quod perabſurdum foret, ſi hujus criminis pæna vitam ademiſſet." But this only ſhews, that the woman was not puniſhed with death, for the law I conceive is not ſpeaking of her marrying the adulterer, but any one elſe. The words of the Digeſt on this law are, "adulterii damnatam ſi *quis* uxorem duxerit." See Dig. 48. lib. tit. 29. ſec. 1.

(19) In Italy and Spain, the huſband has been permitted by law to kill the adulterer. Our law doth not authoriſe ſuch vengeance, however juries may excuſe it; all theſe, and many other proviſions, are to be found in the forty-eighth book of the Digeſts, title 5. which treats of the lex julia de adulteriis coercendis, as the fourth title doth of the lex julia de majeſtate. They ſhould be peruſed by thoſe who wiſh to know more of the Roman laws of treaſon and adultery.

act in his own houſe, and that offender was a perſon of very low ſtation, degrading trade or profeſſion, or infamous character; this reſtriction the law declared to be impoſed to prevent the unbridled paſſion of the angry huſband from operating without reſtraint, for it permitted a father to kill the violator of his married daughter's honour, *adulterum cum filia*, which Wood explains to mean, provided he killed his daughter at the ſame time; the law truſting the father's tenderneſs, that he would not do ſo if ſhe was in his power, wherever he detected the offence; and though it did not pardon to the huſband the fatal effuſions of his wrath under any other circumſtances than thoſe above-mentioned, it charged him not with the crime of murther, but ſubjected him, if of low degree, to perpetual labour; but if of higher rank, to relegation.

The jealouſy of the times of Juſtinian ſeems to have been proportionable to their profligacy, for he permitted the huſband to caution the perſon he ſuſpected not to keep company or converſe with his wife (20), which warning, if diſobeyed after being thrice repeated, excuſed the huſband from the penalty of murther if he killed the ſuppoſed criminal. And even though the jealouſy appeared utterly groundleſs, the magiſtrate might puniſh his perſevering obſtinacy in thus continuing to give uneaſineſs to a worthy though abſurd man.

(20) Nov. 117.

The law was much more rational which permitted ſtrong preſumption, ſuch as the circumſtance of being found in bed together, to ſupply the place of abſolute proof, which in an offence of this ſtamp, it is almoſt impoſſible to obtain (21).

The conſideration of this crime may naturally be followed by that of ſtuprum, (which hath been already more than once defined the living of an unmarried man with an unmarried woman, who lives in reputation) (22), of bigamy, and of inceſt and unnatural luſts. Stuprum, in perſons of rank and ſituation, was puniſhed with forfeiture of half their goods; meaner perſons received corporal puniſhment with relegation. Sodomy was puniſhed with death; and inceſt alſo if in the aſcending or deſcending line; in other caſes, with deportation and confiſcation. Bigamy was a capital crime; but deflowering a girl not fit for marriage, though with her conſent, which by our law is a capital offence if ſhe be under twelve years of age, was by the civil law puniſhed with baniſhment or condemnation to the mines.

(21) The ſame I hold to be our law, yet I have known juries give the moſt extraordinary verdicts from an erroneous notion, that their oaths did not permit them in actions for *crim. con.* to attend to the ſtrongeſt preſumptions, without abſolute and almoſt invincible proof.

(22) This definition found in the Pandects doth not, as I have obſerved, ſeem conſiſtent with the uſe made of the word by Tacitus.

Homicide. The diſtinctions of different degrees of guilt in the commiſſion of this act, are nearly the ſame as by our law. Murther—manſlaugter (23), —excuſable and juſtifiable homicide. Homicide with deliberation and premeditated deſign, was puniſhed with death; and the law on this ſubject which principally claims our attention, is the law enacted by one of the greateſt of murtherers, L. Sulla, the dictator, and thence uſually called the Cornelian law, *de Sicariis.* It comprehended under the name of murther, moſt of the offences contained in our idea of it, and ſome, which though in the eye of conſcience evidently ſo appearing, yet by rational and wiſe politicians, are thought to be perniciouſly included in its puniſhment, for inſtance, perjury, fatal to the life of the accuſed (24).

(23) I inſert the diſtinction of manſlaughter with great heſitation, *in compliance with the opinion of Wood*; for Dr. Chriſtian ſays, in a note on Blackſtone's Commentaries, "In the civil laws, and the laws of Scotland, the diſtinc-"tion doth not exiſt; and perſons tried at the admiralty "ſeſſions where the judges proceed according to the rules "of the civil law, muſt either be convicted of murther, "or acquitted." Yet this law of Scotland ſeems to be ſtatute law; ſee Erſkine's Inſtitutes: and the Pandects, lib. 48. tit. 8. 1. ſay, "leniendam pænam ejus qui in rixa cauſa "magis quam voluntate homicidium admiſit."

(24) With us, the danger of deterring juſt proſecutions by threatening perjury with death, has outweighed the indignation of the law at this cooleſt of deliberate murthers.

The ſingular vengeance denounced by the Roman law againſt parricide, denotes their horror of the crime. The criminal was to be ſcourged, and then ſewed up in a ſack with a furious dog, a cock, a viper, and an ape, and thrown into the water, or amidſt wild beaſts. Theſe animals were choſen as indicative of malice and miſchief, or perhaps becauſe they would be more ſlowly tormenting, and leſs immediately deſtructive (25).

Whether manſlaughter was diſtinguiſhed in the manner known to us as to its puniſhment, or not, there certainly was ſome attention to the diſtinction between the effects of deliberate malice, and ſudden paſſion. This might have led in the latter law to abſolute acquittal, though the authority I have mentioned in a note ſays, *leniendam pœnam*; and in Scotland, according to Erſkine's

The Cornelian law, as quoted in the Pandects, lib. 48. tit. 8. 1. enumerates the following crimes puniſhable with death. "Si quis hominem occiderit,—aut dolo malo incendium fecerit,—aut hominis occidendi vel furti faciendi cauſa cum telo ambulaverit,—quive cum publico judicio præeſſet, operam dediſſet ut quis innocens condemnaretur—aut qui hominis necandi cauſa venenum confecerit—quive falſum teſtimonium dolo malo dixerit, quo quis rei capitalis damnaretur."

Qui hominem non occidit, ſed vulneravit ut occidat, pro homicida habendus.

(25) By the Scotch law, all the poſterity of a parricide are incapable of inheriting—even curſing and beating of a parent infers death, if the perſon guilty be above ſixteen years.

Inſtitutes, both are equally conſidered capital (26).

To the horrid crime of ſuicide, the Roman Stoic was peculiarly indulgent, and though the law did not countenance it generally, it was tolerated in many inſtances, and thoſe inſtances the legiſlature condeſcended to point out (27). On duelling it was ſilent, becauſe the abſurd idea had not yet entered the mind of man.

The doctrines and rules reſpecting excuſable and juſtifiable homicide, nearly, if not entirely, accorded with ours. He who defended himſelf was not to kill, if he could poſſibly eſcape; the perſon who gave a blow with his fiſt, was not to be ſtabbed with a poniard; but if an honourable perſon was treated ignominiouſly, as by contumelious beating and ſcourging, he might defend his honour by the death of his enemy, and the chaſtity of a woman might be defended at the expence of the aggreſſor's life. In defence of ones goods killing was not lawful, unleſs of a thief by night. Caſual homicide, if it happened in doing an unlawful act, was puniſhable, though not capitally.

Theft and robbery come next to be conſidered, and that in a criminal light, as they were before in a civil.

The puniſhment of manifeſt theft was different

(26) Book 4. 6. 19.

(27) Si tædio vitæ vel impatientia doloris, &c. &c. D. 48. 21. 3. 6.

at different times—mulcts, whipping, and amputation of the hand; but Juſtinian ordered that the penalty ſhould be confined to fine and baniſhment. Succeeding emperors ordained ſeverer puniſhments—for the firſt offence, whipping; for the ſecond, ſtigmatizing on the back; for the third, even death by hanging.

The puniſhment of robbery was various according to the degree of the offence. Houſebreakers were condemned to hard labour (28); and if by night, the burglar, after ſuffering the baſtinado, was uſually ſentenced to the mines. Highway robbers (to whom, according to Wood, the name of Latrones was appropriated) after repeated offences, might be puniſhed with death and hung in chains; and the ſame puniſhment might be inflicted on notorious pirates (29).

Circumſtances of courſe aggravated the crime. Sacrilege and manſtealing, called *Plagium*, were always puniſhed with death (30); *Abigei*, the

(28) The civil law here made an abſurd diſtinction, it required that there ſhould be a taking away, and did not conſider a delivery of goods through threats and fear as conſtituting a robbery.

(29) This is not ſupported by Juvenal:

Conductum latronem, incendia ſulphure cæpta.
Sat. 13. line 145.

The Latro there is not a highway robber.

(30) What was the occaſion of this offence being ſo much noticed is not clear, as military kidnapping was then unknown.

drivers away of a certain number of cattle limited by the laws; *Balnearii*, the ſtealers of clothes from perſons bathing (31); and *Saccularii*, cut purſes, were more ſeverely puniſhed; and we have already ſeen that burglary was diſtinguiſhed from houſe-breaking in the day. The receiver and harbourer of a thief or criminal, was alſo puniſhed; but the law ſo far indulged human weakneſs, and the natural affections of the heart, as to forgive the children, the parents, the huſband or the wife, who concealed or endeavoured to ſhelter each other.

Crimen falſi. This name included forgery, and every ſpecies of fraud and deceit, and therefore, according to its nature and degree, was puniſhed ſometimes with deportation, and ſometimes with death. If it was a novel ſpecies of fraud, which had not peculiarly come under the contemplation of the law, nor acquired an appropriate name, it was ranked under the general head of *Stellionate* (32), and puniſhed according to the diſcretion of the judge.

Crimen peculatus (33). This meant ſtealing of

(31) This ſeemingly trifling regulation will be explained by the recollection, that every Roman of any note bathed once or twice a day. Judge Blackſtone remarks theſe diſtinctions of the civil law and the reaſons of them. Com. vol. 4. ch. 17.

(32) *Stellionate*, ſo called from *ſtellio*, a ſort of lizard with variety of ſpots.

(33) So called *a pecore*, from cattle, the firſt kind of property, or perhaps from the firſt money being ſtamped with the image of cattle.

the public money, or cheating in the public accounts. The puniſhment was death.

Crimen reſidui was a miſapplication of the public money.

Crimen repetundarum, or bribery. By this was underſtood the corrupt receiving of money or preſents by perſons in public offices, and it extended to the medium of wives or ſervants. Preſents of meat and drink however were allowed, and others to the value of 500 *aurei* in any one year, if the donor had not any ſuit or petition depending before the donee.

Bribery was puniſhed with death, if thereby an innocent man was condemned—with baniſhment if the guilty was abſolved—and the perſon that gave the bribe was alſo puniſhable.

Crimen ambitus was the crime of procuring public office by money or other gift, or by any unlawful mode of canvaſſing and ſolicitation; under this name was included alſo the offence of a ſuitor viſiting and courting a judge while his cauſe was depending before him (34). At one

(34) From the charge of corruption the judges of theſe countries have, from time immemorial, been perfectly and deſervedly free, with very few exceptions. Even Lord Bacon and Lord Macclesfield had ſomething of cuſtom to plead in their behalf; and the laſt inſtance was tinctured with party. But it is not enough for a judge to be honeſt; he has to contend with the paſſions, the prejudices, the partialities, which, unknown to himſelf, may unwittingly impoſe upon him. To become a hermit is too much to

time the officers of the Imperial court avowedly took rewards for the procurement of office, and were allowed to maintain actions to recover such remuneration, but this practice was abolished by Juſtinian.

Crimen fraudatæ annonæ was the crime of foreſtalling and monopolizing the market, and was puniſhable with death.

The crimes hitherto enumerated had each its appropriated puniſhment. There were others called extraordinary, and puniſhed by the extraordinary power of the judge. Such were threats of death, or bodily hurt,—prevarication, *i. e.* where the informer colluded with the defendant, and made a feigned proſecution.—Removing landmarks,—plundering ſepulchres,—breaking down dams,—breaking of priſon,—taking unlawful diſtreſſes,—women procuring abortion, and latterly the expoſing of infants with intention that they ſhould periſh,—and under this genus were included vagabonds and ſturdy beggars. All ſuch offences were ſaid to be puniſhed arbitrarily, not meaning thereby the wild pleaſure of the judge, but his ſound diſcretion.

aſk, yet he who mixes in ſociety can ſcarce avoid to hear the common, though perhaps falſe fame, of the vicinage.

In France, ſolicitation of the judges (who purchaſed their places) was avowed and univerſal. *Je m'en vais ſolliciter mon juge*, was a common and curious phraſe. Hence, perhaps, the philoſopher will trace one great cauſe of the downfal of the monarchy.

To the black catalogue of crimes and punishments, succeeds the smiling title of mercy, liberation, and pardon. The criminal could not be tried twice for the same offence, even though he confessed the crime subsequently to his acquittal, but he might be prosecuted for the same fact, if it bore two aspects, *diverso intuitu*, as the son who had killed his father, and escaped an accusation of homicide, might yet be tried for parricide, that being a crime of a different nature (35).

One protection of the criminal merits particular attention; that arising from prescription or length of time. For various crimes there were various terms of limitation, but a lapse of twenty years screened the offender from all prosecutions; a regulation which has been imitated by Scotland, and which the civilians insisted was wise, as they reasoned, that limitation in criminal causes was as necessary to quiet the minds of men, as in civil causes to quiet their possessions, that neither property nor life might be uncertain.

We are accustomed to boast of our *Habeas Corpus Act*, as the great glory of English freedom(36); but Rome, though not equally favoured by the genius of liberty, was not altogether without a

(35) So with us, a man acquitted of felony may be indicted for a trespass in the same fact: a man indicted under a statute, may be found guilty at common law.

(36) And so it is in peaceable times, but unfortunately it is always suspended in the only times when any great number of persons can want its aid, in times of trouble.

proviſion of this nature, ſuch as that if a perſon accuſed was not brought to trial within two years, he was to be diſcharged from the accuſation.

The power of pardoning, crowns the munificent beams which iſſued from the merciful ſide of the Roman tribunal. That power which, as Monteſquieu obſerves, the principle of deſpotic governments doth not admit, but which, exerciſed with prudence, produces admirable effects.

CHAPTER III.

OF THE ROMAN COURTS AND ACTIONS.

THE nature of the Roman tribunals, during the time of the Republic, is wrapt in much obſcurity, and hath given riſe to much controverſy. The ambiguous name of Judices, together with the modern application of it, had produced an erroneous opinion, that the perſons ſo called correſponded to our judges. This opinion (1) hath been ſufficiently refuted, and it has been proved (2), that they much more reſembled the modern jury, and that there preſided in the court a diſtinct magiſtrate, who pronounced the verdict or ſentence of the judices or jury.

(1) Neither Dr. Middleton, nor Abp. Potter, ſeem to have been aware of the diſtinction here mentioned, between the judices or jury, and the magiſtrates or preſidents in the courts of judicature, or judges of the bench. Dr. Middleton, in his life of Cicero, calls the judices, judges of the bench.

(2) Particularly by Mr. Pettingal, in a treatiſe expreſsly written to ſhew the antiquity of juries, and their reſemblance to the Greek Δικασται and Roman judices.

A great queſtion has been ſtarted, and ſome deductions made from it applicable to celebrated controverſies in our own times, whether theſe judices were judges of law as well as of fact. During the Roman republic, ſays Dr. Halifax, the office of magiſtrate and judge were diſtinct and ſeparate. The office of the magiſtrate was to enquire into matters of LAW, and whatever buſineſs was tranſacted before him, was ſaid to be done *in jure*. The office of a judge was to enquire into matters of *fact*; and whatever was tranſacted before him was ſaid to be done *in judicio* (3). On the other hand Dr. Pettingal maintains, by many elaborate arguments and ingenious quotations, that they were judges both of law and of fact, and that the preſiding magiſtrate, ſometimes called Judex Quæſtionis, had little to do but preſerve decorum in the court, to collect the opinions, and pronounce a ſentence conformable to the ſentence of the jury.

But a queſtion much more curious, and which I do not recollect to have ſeen agitated, occurs, and that is, how were either the judices, or the magiſtrate, capable of determining on matters of law. To begin with criminal caſes; the judices for all trials in criminal caſes, were choſen by ballot on the kalends of January, the prætor

(3) Halifax Analyſis—Book 3. ch. 8. Of the ſame opinion ſeems to have been the great Monteſquieu.

taking the ballot (4), and then, (5), out of this whole number was ſtruck the jury for each particular cauſe, amounting in number to eighty-one, but rendered, by a power veſted in each party, to challenge or reject fifteen to fifty-one.

The bodies or orders of which the ſelect judiees for the year were taken by ballot, varied at different times, and of ſo great conſequence was that point to liberty, that the controverſies concerning it gave riſe to almoſt all the interior troubles in the Roman ſtate from the time of the Gracchi to the death of Julius Cæſar, the great contention between the higher and lower orders being, who ſhould be maſters of the judices or jury, or out of what orders they ſhould be choſen, and one great cauſe of the odium againſt thoſe illuſtrious men, the Gracchi (6), and of their fatal end, was the transferring the choice of the

(4) This is the account generally given, yet the prætor ſeems to have had ſome further authority from this paſſage of Cicero. Prætores urbani, qui jurati debent "optimum "quemque in ſelectos judices referre," unleſs, as is moſt probable, this barely refers to his returning a general liſt, out for which the juries for the year were to betaken by ballot.

(5) This very much reſembles our method of ſtriking a record jury, under the act of parliament, previous to the aſſizes for all civil cauſes during the ſame.

(6) "Duos Clariſſimos, ingenioſſimos, amantiſſimos plebis "Romanæ viros. Non ut plerique nefas eſſe arbitror Grac-"chos laudare.

judices or jury, from the ſenators to the equites, who were a middle order of citizens.

At a ſubſequent period they were choſen half out of the ſenators, and half out of the equites (7) —(*7), then again out of the equites only (8)— then again divided (9), and at laſt by the Plautian law, choſen out of the three orders, the plebeians being added to the former two.

The ſenate and ariſtocracy being friends of Sylla, and the equites having been partizans of Marius, the former made a law that the judices ſhould be choſen out of the ſenators only. But this regulation laſted but ten years, when they were appointed to be choſen out of three orders (10), the ſenators, equites, and tribuni

" Gracchi qui Plebi Romanæ commodis plurimum co-
" gitaverunt."

Cicero de lege Agrariâ.

(7) By a law of Servilius Cæpio.

(*7) By the lex Glaucia.

(8) By the lex Livia.

(9) Equeſter ordo judicavit quinquaginta annos ſine infamia ſecundum æquum & bonum, is the univerſal teſtimony of antiquity—ne tenuiſſima ſuſpicio, ſays Cicero,—Quæ intra decem annos poſtea quam ad ſenatum judicia tranſlata ſunt nefarie flagioſe que facta ſunt.

(10) The tribuni ærarii were not, as the name might ſeem to import, quæſtors or treaſurers of the army, but repreſentatives of the very loweſt orders.

ærarii, and thus they appear to have been at the trial of Milo (11).

But in all theſe modes of appointment, there is no reaſon to ſuppoſe that the judices or jury thus choſen, were well if at all qualified to judge of matters of law, or verſed in legal ſcience.

And though I have been hitherto ſpeaking of criminal caſes, we ſhall ſee little reaſon to expect more legal knowledge in thoſe of a civil nature.

The juries, or if that name be not approved, the aſſiſtance of the prætor, were, according to Kennett (12), of three ſorts, Arbitri, who were appointed to determine in ſome private cauſes of no great conſequence, and of very eaſy deciſion; Recuperatores, aſſigned to decide controverſies about receiving or recovering things which had been loſt or taken away; and Centumviri, who tried cauſes of a ſuperior order.

I think he has omitted an order of inferior judices between the Recuperatores and the Centumviri; or, in other words, that all the trials above the cognizance of the Arbitri and Recuperatores,

(11) The votes on Milo's trial ſtood thus:

Condemned by		Acquitted by		
Senators	12	Senators	6	
Equites	13	Equites	4	
Trib. Ær.	13	Trib. Ær.	3	
	38		13	Total 51

30 challenged make 81.

(12) Roman Ant. tit. book 3. ch. 17.

were not *centumviralia judicia* (13). Heineccius particularly obſerves, that the *judices ſelecti* did ſometimes determine private cauſes, and proves it from a paſſage out of Suetonius. But it matters not to our preſent queſtion. Certain it is, that the moſt important civil cauſes, and thoſe which required moſt knowledge and judgment, were reſerved for the Centumviri. Now who were they? one hundred and fifty men, (for the number did not anſwer exactly to the name) annually choſen, three out of every tribe, to decide private controverſies. What reaſon is there to ſuppoſe that they were much greater lawyers, though they might be more reſpectable jurymen than their fellows?

We muſt then look to the preſiding magiſtrate, the real judge, not called *judex* indeed, but yet really and truly correſponding to the judge on the bench, and not to the juryman, to give his aid and direction in point of law.

This preſiding magiſtrate was properly the prætor (14); but as the prætors, though their

(13) Centumviralia judicia ſunt, uſu capionum, tutelarum, gentilitatum, mancipiorum, parietum, luminum, teſtamentorum ruptorum, aliorum que hujus generis. Cic. de Or. c. 1. 38. Theſe Centumviri were divided into chambers, like the Roman rota in modern days, for trying each its own particular ſpecies of cauſes.

Judex Pedaneus was ſo called, becauſe in ſubſelliis & quaſi ad pedes prætoris ſedebat.

(14) The people at ſome periods might chooſe judges in criminal caſes diſtinct from the prætor, called Quæſitores Paracidii.

number was latterly encreaſed, could not poſſibly preſide at all trials, they appointed deputies both in civil and criminal caſes, viz. in the former the decemviri litibus judicandis, and in the latter a judex quæſtionis (15). The decemviri were choſen out of thoſe who had been quæſtors; the judex quæſtionis, out of thoſe who had borne the ædileſhip; but as we can ſee no reaſon why the quæſtorſhip or ædileſhip ſhould require or give a general knowledge of law, and as the prætorſhip being annual, his deputies muſt have been alſo, the difficulty is not much removed.

The only way which occurs to me of accounting for the poſſibility of the exiſtence of the judicial power, without ſtanding judges learned and experienced, is by ſuppoſing, that in a military ſtate, little acquainted with commerce, few laws and ſimple controverſies required no great knowledge to decide them, and that the deciſions were often like thoſe of the Turkiſh cadi, if honeſt, governed chiefly by the good ſenſe of the individual; a ſuppoſition rendered more probable when we reflect, that in the earlier times of Rome, every prætor made his own code, and publiſhed at his entrance into office the rules, regulations, and maxims of juſtice, which

(15) At Milo's trial it happened, from the particular time of the year, that there were no magiſtrates elected, and Pompey veſted for the occaſion with extraordinary power, himſelf appointed the judex quæſtionis for that cauſe.

appeared to him proper to be followed in the enſuing year, until in more improved times he was obliged to attend to precedent, and the Jus Prætorium became a permanent Code.

In the times of the Emperors, we find theſe judices ſelecti, gradually going into diſuſe,—the power and authority of juries neglected and deſpiſed, and gradually all judicial authority veſted in the magiſtrate or judge of the bench alone, and theſe magiſtrates ultimately becoming permanent like our own tribunals, as will appear from the following extracts from a paſſage in the Novellæ, 82. 1. "Vetus ſchema "Zenonis omnino perimimus—eligere vero per- "ſpeximus—qui communes omnium erunt Ju- "dices;" and a little after it ſays, "Quia vero "competens eſt eſſe etiam majores aliquos dig- "nitate provectos, experimento cauſarum mul- "tarum aut plurimi temporis exercitatoſq. ideo "perſpeximus," &c. (16). *Judex* here plainly ſignifying judge of the bench, for it is ſaid in the next chapter, "Judices itaque poſt noſtros "adminiſtratores hos eſſe volumus, & his negotia "deligamus."

It was a principle of the Roman law, in determining who ſhould be the judex, or what the

(16) Before the age of Juſtinian, or perhaps of Dioclefian, the decuries of Roman *judges* had ſunk to an empty title, and in each tribunal the civil or criminal juriſdiction was adminiſtered by a ſingle magiſtrate, who was raiſed or diſgraced at the will of the Emperor. GIBBON.

court of deciſion, that *actor ſequitur forum rei*, a principle eagerly adopted by the canoniſts to exempt eccleſiaſtics from lay juriſdiction, but not imitated in the European courts of admiralty, which ſeize the goods of a foreign debtor if found in the creditor's country, and bring the cauſe to the creditor's tribunal; but in Friſeland, ſays Huberus, which is particularly tenacious of the civil law, this practice doth not prevail.

Trials were either more or leſs ſolemn, the former pro tribunali, the latter ſtiled de plano, being decided by the haſty ſignature of the prætor at his own houſe, or in the public way without any formal decree, upon mere petition (17). In the more formal trials, the party proceeded by regular forms of action according to the nature of his caſe, which calls upon us to give a general view of the Roman actions.

They were divided in the firſt place into real, perſonal and mixed. *Real* actions, otherwiſe called vindications, were thoſe in which a man demanded ſome certain thing that was *his own*; and were founded on dominion or *jus in re*. Perſonal actions, denominated alſo *con-*

(17) It is a great miſtake to think that cauſes heard *de plano* included all ſummary proceedings. Some of thoſe pro tribunali were alſo ſummary, ſo that *de plano* and *ſummatim* are not ſynonimous. It is a miſtake alſo to ſuppoſe that no ſummary proceeding was in writing. Actor eligit in cauſa ſummaria an velit petere ſcriptis vel verbo. Rep. Berta. Chini. 36.

dictiones, were thoſe, in which a man demanded what was barely *due* to him, and were founded on obligation, or *jus ad rem*. Mixt actions were thoſe in which ſome ſpecific thing was demanded, and alſo ſome perſonal obligation was claimed to be performed (18).

Actio *realis* dicta eſt ex re, quæ petitur; puta quando quis nullo jure mihi obligatus eſt, ſed volo illi quæſtionem ſuper aliqua re movere. *Perſonalis* dicitur quando perſona obligata eſt; puta, cum ago contra eum, qui mihi in aliquo contractu vel maleficio, vel quaſi, obligatus eſt. Sed certe ſecundum hoc videtur quælibet actio realis & perſonalis; nam ſi peto rem, per conſequens dico te obligatum ad rem ipſam tradendam ſeu reſtituendam, & ſic habet locum realis & perſonalis. Item ſi peto a te decem ex cauſa mutui, dirigo actionem meam in ipſa decem; & ſic habet locum realis & perſonalis. Conſiderandum eſt autem ex quo fonte prima procedit actio, et ſecundum initium et originem facti cenſenda eſt perſonalis aut realis. Nam in contractu vel quaſi, maleficio vel quaſi, *perſona principaliter* obligatur: & ideo tantum actio perſonalis locum habet. Cum vero agit ad rem, *res* tantum *principaliter* petitur.

(18) I have taken this firſt paragraph from Halifax, becauſe it is impoſſible to expreſs the diſtinctions more clearly or better.

Real actions with us have a more limited meaning, as confined to *real* eſtate, a diſtinction of property unknown to the Romans.

Scias quod in nulla reali actione debet quis dicere, peto mihi rem reſtitui, ſed tantum peto rem ipſam vel hæreditatem. Lib. 2. Speculi de Actione.

Real actions were either *civil* or *prætorian*. The former were *rei vindicatio*, properly ſo called, and the *actio confeſſoria* & *negatoria*. The firſt ſuppoſed property in the plaintiff, poſſeſſion in defendant, and required a previous deciſion as to the poſſeſſion *pendente lite* (19). The ſecond and third were intended to be applied to incorporeal things, the firſt claiming a ſervice in another's eſtate, the other denying that his own was liable to a ſervice or *ſervitus*.

Real actions being directly or properly given by the law for the revindication of thoſe things

(19) The whole conduct of the action called *rei vindicatio* may be ſeen in Cicero's Oration for Muræna.

This diſtinction between the *petitory* and *poſſeſſory* ſuit is worthy of remark by thoſe who wiſh to inveſtigate the origin of our poſſeſſory bills.

The determination of the poſſeſſion in the intermediate time is often illuſtrated by the ſtory of Appius and Virginia, who, in flagrant violation of all principles of law, decreed that poſſeſſion in favour of ſlavery.

This interlocutory decree, called in the Roman law *lis vindiciarum*, has been uſual in our court of admiralty, as ſhall be ſhewn hereafter.

The meaning of a *ſervitus* has been illuſtrated in a former part of the volume. It may be further exemplified by pariſhioner's *right* to bury in the church-yard, though the freehold be in the parſon: that is, a *ſervice* from a thing to a perſon or perſons.

only, in which a man had a veſted property or dominion, the prætor was obliged to lend his aid in many caſes, for inſtance, by the *actio publiciana*, if a depoſitary or truſtee loſt poſſeſſion of a thing, (in which in time he would have acquired a property,) before the property accrued.—*Reciſſoria*, to guard the rights of perſons in an enemy's priſon or beyond ſea, and reſcind preſcriptive claims ſet up in their abſence.—*Pauliana*, where a debtor had diſpoſed of any thing to defraud his creditors (20); and *Serviana*, to recover a diſtreſs eloigned, actions deriving their names from the various prætors who were the authors of them.

If incident queſtions aroſe, which muſt be determined previouſly to the main queſtion, they were tried in actions alſo ranged under the head of real, and termed præjudicial actions, as for inſtance, whether the plaintiff was a ſlave or a baſtard (21).

The perſonal actions of the civil law, as Mr. J. Blackſtone obſerves, were of the ſame nature with ours; they aroſe from contracts or torts, either legally or equitably. To recount them, ſeems to me, at this day, an idle and ſuperfluous taſk, but curioſity may be ſatisfied by re-

(20) This anſwers to our ſtatute againſt fraudulent conveyances.

(21) Theſe may be compared partly to pleas in abatement, partly to iſſues out of chancery. Bracton ſpeaks of præjudicial actions, lib. 3. cap. 4.

curring to the brief but clear analyſis of them made by Biſhop Halifax. I will content myſelf with explaining the names of one or two of them, which even now not unfrequently occur to learned readers.

Condictiones, or condictious actions, took place when new laws introduced new obligations, without preſcribing the particular ſuit or mode of enforcement. The *actio in factum*, or *præſcriptis verbis*, which may properly be conſtrued an action on the caſe, has already been explained (22).

Reſtitutio in integrum was to reſcind the contracts of minors, or ſuch as had been made through force or fear. *Ex mutuo—commodato, depoſito, locati conducti—empti venditi.—Pigneratitia* explain themſelves by the names of the contracts from whence they ſprung, and in many of theſe caſes there was not only a direct, but a contrary action, that is, the defendant had his action. E. G. the depoſitary againſt the depoſitor, to indemnify him for any expences incurred.

Of mixt actions the moſt remarkable men-

(22) As applied to *innominate* contracts. See Chap. II. *Præſcriptis* a Jureconſultis *quum nullæ formulæ darentur a Pontificibus vel prætoribus*. If it were worth the time many reſemblances might be ſhewn between condictitious actions and ſome of ours: thus *condictio indebiti*, was *aſſumpſit* for money paid by miſtake.—*Condictio cauſa data non ſecuta*, *aſſumpſit* to recover back money, where the conſideration happened to fail.

tioned are the *communi dividundo* and the *finium regundorum*, of partition, and boundaries (23), and they were ſo, becauſe the prætor might, inſtead of aſſigning the land, give if he choſe a pecuniary compenſation and remedy againſt the perſon; but why this was more peculiarly the caſe in theſe particular queſtions about landed property, doth not ſeem ſo clear.

The next grand diviſion of actions was into thoſe *bonæ fidei, ſtricti juris, & arbitrarias.* In the ſecond inſtance the court was legally confined to the ſtrict words of the contracts or agreements;—in the firſt with more latitude could judge what was the real equity of the caſe;—in the laſt, if the defendant refuſed to liſten to reaſon, the judge was allowed to puniſh his obſtinacy by decreeing more than the ſum even equitably due. Indeed the actions *bonæ fidei & arbitrariæ* ſeem to have been decided by arbiters, *arbitri*, and not by the *judices*.

Actions were again divided into perſecutory of the thing, or penalty, or both. By the firſt were meant all real actions, and all perſonal founded in contract; by the ſecond thoſe founded in tort; by the laſt ſuch in which ſome thing was recovered, and alſo a penalty impoſed on the defendant, as the action *de vi bonorum raptorum.*

The diſtinctions of actions into ſuch in

(23) *Familiæ ereiſcundæ* and *Hæridatatis aditio*, when a ſtranger kept poſſeſſion againſt the heir, were alſo mixed actions.

which double, triple, and fourfold damages were recoverable, or in which leſs than the ſum due was recoverable, as for a dividend of a bankrupt's effects, are of leſs importance. As actions might be founded in contracts entered into not only by the man himſelf, but alſo by thoſe under his power, as his ſon or his ſlave; this gave riſe to another diſtinction of them, and as ſuch perſons might alſo commit wrongs for which the father or maſter were anſwerable, the claſs of *noxal* actions originated from thence.

The diſtinction of the *actio directa & utilis*, is familiar and plain; the former ſprung from the direct words of a law, the latter from its equitable interpretation.

The laſt diſtinction I ſhall mention, is into perpetual or temporary; the former were ſo called becauſe at firſt there was no ſtatute of limitation affecting them, though they were afterwards confined to *thirty* years, which ſeems to have been the longeſt limit allowed for bringing any action; as to temporary in many caſes the limitation was ſhorter, even down to *three*, and thoſe ſavouring of a criminal nature were confined indeed to *twenty* at the moſt. *Prætorian* actions at firſt muſt have been brought within a year, but afterwards the time was regulated by analogy with thoſe called *civil*.

The power of *cumulating* actions deſerves particular notice; it is unknown to the Engliſh law, and even to the Scotch, but is a diſtinguiſhing

feature in the practice of our court of admiralty, which ſo cloſely follows the civil law, and the principle on which depends the ſalutary privilege of ſeamen and others to join in the ſame ſuit, the general ground of action being the ſame, in that court, which advantage is one of the great boaſts of that tribunal. It is neceſſary therefore to know that the Roman or civil law, for the ſaving of expence, and curtailing of litigation, admitting the junction of ſeveral actions depending on one and the ſame ground, as in imitation of it our courts of equity will allow commoners to join in ſuit on a queſtion of common, or pariſhioners to eſtabliſh a general *modus*.

Calvinus, in his Lexicon Juridicum, has from the civil law (particularly the beginning of the pandect, de Juriſdictione omnium Judicum, and the end of the chapter in the Code de Annali Exceptione) abridged the following account of the cumulation of actions. Cumulatio eſt jus perſequendi multis actionibus, in uno eodemque judicio editis, gratia minuendarum litium ſemper permiſſa niſi fuerit nominatim prohibita. Eſt introducta propter compendium litigandi, ſcilicet ut apud eundem judicem, eodemque tempore, ſimul diſceptentur ea quæ alioquin multiplicatis ſumptibus & moleſtiis ſeorſim expedienda forent. *tit. Cumulatio.*

The method of proceeding in criminal caſes was threefold, by inquiſition, accuſation, and denunciation, names and modes of proceeding

alſo familiar to the eccleſiaſtical courts in modern times.

Inquiſition was an act of the judge making enquiry by virtue of his office in general, or upon common fame exiſting among credible perſons, and was either general or particular.

Accuſation was a ſolemn charge of a crime, in order to public puniſhment, preferred to a judge by a private accuſer.

Denunciation was the delation of the charge to a proper tribunal, by perſons peculiarly called upon by their offices to enquire into the exiſtence of crimes (24).

I ſhall here conclude this compendium, which I truſt will be an uſeful, and from the difficulty of compreſſion of ſuch vaſt materials has certainly been to me a laborious ſelection of thoſe points which appeared moſt worthy of notice in modern days. By way of Appendix the Practice of the Eccleſiaſtical Courts, as is deduced from the Civil Law, is here annexed.

(24) Denunciations, ſuch as preſentments of offences, by churchwardens and queſtmen, are almoſt out of uſe with us; the two other modes of proceeding are familiar under the names of the *mere office*, and the *office promoted*. The name of inquiſition ſeems to have gone into diſuſe, through deteſtation of the vile uſe made of it by certain foreign eccleſiaſtics.

PRACTICE OF THE ECCLESIASTICAL COURTS.

The reader will in this chapter find ſome paſſages in the text, and ſome notes, which are repeated in the chapter upon Admiralty Practice in the ſecond volume. This was unavoidable, unleſs important matter were to be omitted in treating of one practice or of the other, or unleſs the ſtudent of one was to be perpetually referred to the other, with much inconvenience.

ON

THE PRACTICE

OF

THE ECCLESIASTICAL COURTS.

HAVING now taken a ſhort ſurvey of the civil law, we ſhall be better prepared and enabled to underſtand the practice of the eccleſiaſtical courts. I ſhall ſpeak firſt of the conſiſtorial, then of the prerogative, and laſtly of the courts of appeal.

All proceedings in the court of prerogative being ſummary, to underſtand practice thoroughly, our firſt and principal attention ſhould be paid to the conſiſtorial courts, for having once well comprehended the proceedings in a plenary ſuit, it will be eaſy to explain thoſe in a ſummary.

OF THE PRACTICE OF THE CONSISTORIAL COURTS.

Cauſes in theſe courts are either plenary or ſummary. *Plenary* (1) being thoſe in which

(1) Plenary cauſes, among many others, are all teſtamentary cauſes, except in the court of prerogative, thoſe of jactitation, dilapidation, ſimony, and all cauſes of correction from the office voluntarily promoted. Tithe cauſes in Ireland, and thoſe from the mere office, may be examples of ſummary. Defamation cauſes may be now heard *ſummariſſime*. See 6 Geo. I. ch. 6. ſec. 13.

If in plenary cauſes, the proceeding be ſummary, *i.e.* with-

the order and ſolemnity of the law are exactly obſerved, ſo that if there is the leaſt infringement or omiſſion of that order, the whole proceedings are annulled.—*Summary*, thoſe in which ſuch order is diſpenſed with. My firſt buſineſs ſhall be, and it is much the moſt important, to explain the order of proceeding in plenary cauſes.

In every plenary cauſe there are three parts, one from the citation to the conteſtation of ſuit inclufively.

The ſecond, from the conteſtation of ſuit excluſively to concluſion in the cauſe inclufively.

The third from concluſion to definitive ſentence.

Under the firſt diviſion I ſhall conſider,

1. Citation.
2. Contumacy.
3. Appointment of a proctor.
4. The Libel.
5. Exceptions, Replication and Conteſtation of ſuit.

Under the ſecond

1 Further allegations } with exceptions to
2. Perſonal anſwers } each.

ont conteſtation of ſuit, in allegation and term to propound all things, and to conclude, and without concluſion the whole is nullity; but in ſummary cauſes the proceeding be plenary, it is not neceſſary. In cauſe of nullity, therefore, it is better to proceed plenarie. See Cheſhum's Codex juriſconſum, &c. p.

3. Proofs by witneſſes.
4. Publication.
5. Term to propound.
6. Concluſion.

Under the third,
1. Sentence.
2. Execution (2).

CITATION.

Since citation is the beginning and foundation of the whole cauſe, and an invalid citation can produce no effect (unleſs cured by the appearance of the impugnant in perſon, or his lawful proctor), it is neceſſary to obſerve the requiſites to a good citation, which Gail reduces to ſix (3), viz. the inſertion of the name of the judge—

(2) I think this the plaineſt analyſis; Oughton makes one ſomewhat different, and many of the writers on civil law, a third ſtill different from his, viz. *preparatoria judicii*, the preparatives of the cauſe, which are down to conteſtation of ſuit, and *judicium ipſum*, the cauſe itſelf, which is from conteſtation of ſuit to ſentence incluſively, and divide both the preparatories, and the members of the cauſe itſelf, into ſubſtantial and incident. *Intervention* and *reconvention* will come in with more clearneſs, after once analyſing a ſimple ſuit free from thoſe ingredients.

(3) Oughton doth the ſame. I prefer Gail to Maranta upon this head, becauſe the latter expreſsly declares that he is looking to the local practice of the kingdom of Naples.

of the promovent—of the impugnant—of the cauſe of ſuit—of the place—and of the time of appearance, to which we may add the affixing the ſeal of the court, and name of the regiſter or his deputy.

In mentioning the defendant, beſides the deſcription of him evidently neceſſary, the 120th Canon (4) ordains that no biſhop, or other eccleſiaſtical judge, ſhall ſuffer any general proceſs of *quorum nomina* to be ſent out of his court, except the names of all ſuch as are thereby to be cited ſhall be firſt expreſsly entered by the hand of the regiſter or his deputy under the ſaid proceſs, and the ſaid proceſs and names be firſt ſubſcribed by the judge, or his deputy, and his ſeal thereto affixed.

The ſpecies of perſons to be cited is alſo to be conſidered. Noblemen are to be cited by letter miſſive. Minors under twenty-one to be enjoined to appear according to law, that is, by their guardians, (or if they have no guardians, themſelves or the perſons they reſide with are cited), and bodies politic by their ſyndic lawfully conſtituted. From a conſiſtorial court, no citation can iſſue to ſummon a man out of his dioceſe (5).

(4) The 69th in Ireland.

(5) By ſtatute; but if he appear, and ſubmits to the ſuit, no prohibition will be granted.

CONTUMACY.

Under the laſt head we ſuppoſed the party cited to pay obedience to the citation. We muſt now conſider the caſe of his contumacy in not appearing. Firſt, when he has been ſerved with the citation; ſecondly, when he abſconds, or at leaſt cannot be found, to be ſerved with the citation; and, thirdly, I will conſider the caſe of his appearing, and diſappearing again.

In the firſt inſtance, the primary citation being returned, and oath made of the ſervice thereof, and upon proclamation made the party not appearing, it is prayed, in pain of his contempt, that a citation iſſue, ſummoning the party to ſhew cauſe why he ſhould not be excommunicated.

This being ſerved on him, and not being obeyed, a citation iſſues to him or her to *ſee* or *hear* themſelves excommunicated, together with a mandate or authority to ſome proper perſon to execute the ſaid citation, the whole of which is uſually prayed for by the name of a *videndum ad mandate* (6).

The laſt mentioned citation being returned, and oath made of the ſervice thereof, and the

(6) If the party once appear, and appoints a proctor who exhibits a proxy, all the trouble on the following page is ſaved, for this proctor never can diſappear in the conſiſtorial court.

madate being alſo returned, together with a certificate of the execution thereof, the judge aſſigns the party to be excommunicated, which however ſtill cannot be done till the end of fourteen days, at the expiration of which time the proctor offers a ſchedule or decree for excommunication in writing, which the judge at his petition, on that or perhaps the next court day, (7) reads and promulges (8). The party is then to be *denounced* and declared excommunicate in his pariſh church, by the miniſter only, in time of divine ſervice upon a Sunday, and the denunciation, with a certificate of the execution thereof, is lodged with the regiſter; and then if the party ſtands out excommunicate for forty days, to be reckoned not from the excommunication but from the denunciation, application is made to chancery for the writ *de excommunicato capiendo* (9).

After all this tedious proceſs, though the con-

(7) Whether this and other acts ſhall be done on ſucceeding court days, or more time be given and allowed, muſt depend very much on circumſtances, and the diſcretion of the court.

(8) If the judge be a layman, he muſt call in ſome proper and diſcreet clergyman to read the ſentence of excommunication in his preſence.

(9) The proceedings, if the party ſtands out excommunication for forty days, with the mode of application to chancery for the writ de Excomm. Cap. are found in Burn, title Excomm.

tumacious perſon is puniſhed, his adverſary has made little progreſs towards the hearing of his cauſe. He muſt now, to enable himſelf to proceed to hearing without an appearance on the other ſide, iſſue a citation, called a *citation to all effects*, the purport of which is to deſire the defendant to come and ſee all the proceedings which are to be had, recounting them minutely up to final ſentence. A libel is next lodged in the regiſtry, and an order made that the oppoſite party do anſwer it within a certain time, which he not doing, his non-appearance is taken for a negative conteſt (10) or plea of the general iſſue, and the plaintiff or promovent proceeds with his proofs, and goes on to hearing.

2dly. Now ſuppoſe the party abſconds and cannot be ſerved, or it cannot be found where he is, though he doth not intentionally conceal himſelf, the primary citation being returned with a *non eſt inventus*, in the former caſe a citation *viis & modis* iſſues, in the latter a public edict.

The citation viis & modis, as the name imports, muſt be executed in all or any of the ways that occur of making it moſt public—by publication in the ſtreet, or in the church in

(10) But in the prerogative where the proceedings are *ſummary*, upon the return of the firſt citation, the non-appearance is taken for a negative conteſt, and you pray liberty to file a libel, no *videndum ad mandate*, nor any thing of that kind being neceſſary, except in proceedings for coſts, and ſuch like.

time of divine ſervice, or by affixing it to the door of the manſion-houſe (11) or pariſh church of the party, or perhaps, (which is the uſual way of executing the public edict), by affixing it on the public exchange, or ſome ſuch noted place of reſort. The public edict is executed in the mode laſt mentioned.

The citation viis & modis, or public edict, being executed, a certificate muſt be made of the premiſes, and the citation brought into court; and if the party cited then appear not, the proctor of the oppoſite party accuſes his contumacy, he being firſt three times called by the crier of the court, and in pain of his contumacy requeſts that he may be cited to ſhew cauſe why he ſhould not be excommunicated, which being alſo returned with a *non eſt inventus*, a videndum ad mandate *viis & modis* iſſues, and the party is then excommunicated, and afterwards denounced excommunicate; after which a citation *to all effects* iſſues, upon the return of which liberty is given to the promovent's proctor to exhibit a libel, and produce and examine witneſſes, and to go on to ſentence.

3*dly*. The third caſe is where the party has appeared, and appointed a proctor who exhibits a proxy, and afterwards wants to diſappear again. In the prerogative court this doth not ſignify, as he can be proceeded againſt in his abſence; but

(11) The outward door, for the houſe cannot be entered for the purpoſe without conſent.

in the conſiſtorial court formerly infinite delay and miſchief were occaſioned by this trick of an impugnant, becauſe his adverſary was obliged in ſuch caſe over and over again to proceed by videndum ad mandate, even to compel him to anſwer or join iſſue upon a libel or allegation (12). In the conſiſtorial court, therefore, the late eminent judge eſtabliſhed a rule, which has been followed by his very learned ſucceſſor, that either party, when he appears and exhibits a proxy, cannot diſappear under pain of ſuſpenſion of the proctor attempting ſo to do, which ſalutary mode renders the old tedious proceſs in ſuch caſe unneceſſary. There ſeems, however, to be a difficulty where a perſonal anſwer is called for, for that the proctor cannot give in; but I have heard it ſaid, that in ſuch caſe, for want of the anſwer, the party would be excommunicated *inſtanter*. And in another caſe the party muſt be proceeded againſt perſonally and excommunicated, and the appearance of his proctor can be of no ſervice, or rather his appearance is ſuſpended, viz. where the party is contumacious in not obeying the order of the court reſpecting the payment of alimony. (13).

APPOINTMENT OF A PROCTOR.

The citation being returned, a proctor in the uſual courſe appears for the promovent, and ſup-

(12) This is founded in the practice of the canon law.

(13) There may, perhaps, be other caſes which do not occur to my recollection.

poſing the impugnant to obey the citation, a proctor alſo appears for him. Theſe proctors may be recalled before conteſtation of ſuit, not after, in ſtrict practice. After conteſtation of ſuit, and not until then, they become domini litis, the effect of which is, that they can ſubſtitute another proctor in their place, which they cannot do before, at leaſt without a ſpecial proxy or a ſpecial clauſe in the general one (14), and may then proceed in the ſuit, even after the death of the client, and all notices are directed to them only.

The proctor is to be appointed verbally by the party preſent in court (15), or by writing under ſeal atteſted by a notary public, or ſometimes merely ſigned by the party. And though he have ſuch authentic proxy under ſeal for all general purpoſes, a ſpecial proxy may ſtill be requiſite, to give him authority for ſome particular purpoſes.—E. G. in a teſtamentary cauſe, ſuit having been conteſted, and the will denied, the party cannot afterwards come in and confeſs the will on his general authority without a ſpecial proxy for that purpoſe; if therefore he has no ſpecial proxy, he muſt let the cauſe go

(14) This is uſual, and includes a clauſe empowering them to ſubſtitute from the beginning. *Notices* of motions, &c. are not recognized by theſe courts, as by the courts of law, though they may be uſed by the proctors inter ſe for mutual information.

(15) Uſually in writing.

on upon proof, to a hearing *ex parte*, which indeed is the uſual and beſt mode.

Proxies are always neceſſary, but particularly in the prerogative court, becauſe there they proceed in the abſence of the party, which cannot be done in the conſiſtorial courts.

The proctor ceaſes to be proctor, and is *functus officio* after ſentence and appeal, or by the death of the party before conteſtation of ſuit, or he may inform the court at any time that he wiſhes to be no longer employed for the party.

In ancient times, beſides the libel, there were put in, after conteſtation of ſuit, poſitions and articles (16). Theſe are all now comprehended in the libel.

The poſitions were intended to be anſwered by the adverſary, the articles to be proved, and what was poſited could not be controverted, *qui ponit fatetur*, but neither of them were in an interrogatory form, any more than is any part of the libel in the ſpiritual court.

LIBEL.

We ſhall here conſider the requiſites to a good libel, in conſidering which Gail will be an excellent guide. It muſt conſiſt of a narration and concluſion (17). It muſt be apt, and the ineptneſs of the libel is chiefly to be looked for in the concluſion or prayer, which reſtrains the

(16) By the practice of the canon law.

(17) See Gail, lib. 1. Obſerv. 61. et deinceps.

narration to what itſelf contains, and which is abſolutely neceſſary in civil caſes, though not in criminal; but as a general prayer has the ſame effect as in the courts of equity, it is generally put in, in the ſame ſalutary manner, e. g. thus: *wherefore this party prays right and juſtice, and with coſts*, &c. or perhaps a little more particularly thus: *wherefore* this *party prays right and juſtice, and that ſhe may be ſeparated from the bed and board of the ſaid A, and that he may be compelled to pay ſufficient alimony to this party, according to his fortune, quality, and condition, with alimony pending this ſuit, and coſts.*

The proper definition of an *inept* libel, is when there doth not appear therein a cauſe of action; if the libel be inept only in part, it doth not vitiate the whole.—The judge is if poſſible to ſupport the libel, and interpret it favourably for the plaintiff, and when he rejects it, according to Gail he may, without diſmiſſing the defendant, enjoin the plaintiff to exhibit another libel clear and properly concluſive.

The libel muſt be clear and explicit, for otherwiſe how can the defendant know how to defend himſelf, or the judge how to pronounce ſentence? and this is particularly neceſſary in a criminal ſuit (18). Obſcurity, ſays Gail, may ariſe in a libel, on account of its being too

(18) Gail, lib. 1. Obſ. 67. This muſt mean, I take for granted, before conteſtation of ſuit.

general, too indefinite or vague, equivocal, or alternative.

The other characteriſtics of a good libel, ſuch as that it ſhould be ſufficiently certain, not idly long, irrelative, or argumentative (19), are too obvious to need diſcuſſion. Heineccius laughs at many of the clauſes uſually inſerted, and even at the prayer for coſts, which, ſays he, the judge is by his office bound to decree, though not mentioned (20).

The promovent's proctor, on putting in the libel, prays the impugnant's proctor's anſwer, who then prays a time to be aſſigned him to prepare an anſwer, which in the common courſe is the next court day, but may be enlarged at the diſcretion of the judge. The promovent's proctor alſo ſays, or rather is ſuppoſed to ſay, that he repeats the libel, and prays it may be repeated *in vim poſitionum & articulorum* (21).

(19) "In criminalibus libellus obſcurus vel generalis "non procedit, etiam parte non opponente, ſed debet eſſe "certi criminis loco & tempore coarctati, ita ut reus nega- "tivam loco & tempore coarctatam probare poſſit—aliter "defenſio tolleretur." Gail, lib. 1. Obſ. 612. There is no point in which libels are ſo apt to offend as this; hence our pleadings in the ſpiritual courts often bear the reſemblance rather of a lawyer's ſpeech, than of a party's pleading; full of *invective* and *inference*, when they ſhould contain only *averments*.

(20) On the Pandects, part. 1. 338.

(21) For the meaning of this ſee *ante*, p. 461.

Caveators muſt both allege immediately. A copy of the libel muſt be given to the impugnant by 2 Henry V. ſtat. cap. 3. but no prohibition will go to the admiralty for refuſing the copy of a libel, for the ſtat. 2 Henry V. doth not extend to the admiralty. See Salk. 553.

The libel being thus filed with all due circumſtances, the next ſtep is for the impugnant to give in his anſwer to it.

EXCEPTIONS, REPLICATION, AND CONTESTATION OF SUIT.

The libel is anſwered in a general manner by a conceſſion of its truth, which is called *conteſting it affirmatively*, or by a general denial in the nature of a plea of the general iſſue, which is ſaid *to conteſt it negatively* (22): Or it may be oppoſed by exceptions, in the nature ſometimes of demurrers,—at other times of pleas in bar, or in abatement, as ſhall be explained preſently; or by pleadings, ſtiled in theſe courts matters *contrary*, *defenſive*, or *juſtificatory*; and in common parlance, any one of theſe is ſaid to make a conteſtation of ſuit (23), though inaccurately.

(22) The uſual form of conteſting it negatively is, *admit the ſame as far as*, &c. &c. *and conteſt the reſt negatively*, A. B. advocate.

The &cs. mean as far as it makes for, or is favourable to my client.

(23) Strictly ſpeaking, conteſtation of ſuit is confined to the *general iſſue*.

If the impugnant neither confeſſes the promovent's libel, nor conteſts it negatively, which is pleading the general iſſue, he probably then puts in an exception, which exception may be either *peremptory* or not; if it perempts the ſuit, it muſt do ſo either for cauſe apparent on the face of the libel, or for cauſe firſt appearing in the exception itſelf. In the firſt caſe it anſwers to a general demurrer,—in the latter, to a ſpecial plea in bar.

If it doth not perempt the ſuit, but excepts for the defect of form in the promovent's pleadings, or for matters ſet forth in itſelf, but not amounting to a bar, it anſwers in the firſt place to a demurrer for want of form, in the latter to a plea in abatement. But ſtill to all theſe various pleadings, the civil law has aſſigned only the general name of *exception*, with a diſtinction into thoſe *dilatory* and thoſe *peremptory*.

In modern practice indeed more names of pleadings have been introduced over and above thoſe known to the ancient. If the plea be a juſtification, it is called a *matter juſtificatory*—if it be of an excuſing nature, and contains much defence, but does not amount to a full juſtification, it is called a *matter contrary and defenſive*; and if it denies the fact not generally, but ſpecially ſetting forth ſpecial circumſtances, it is called a *matter contrary* only (24).

(24) The diſtinction of the civil law between *exceptions* properly ſo called, and *defences*, doth not ſeem however perfectly to tally with the diſtinctions above, which I have

To illuſtrate all theſe by example: if in a ſuit for jactitation, the party can poſitively deny the fact, he *conteſts the libel negatively*; but ſuppoſe in a ſuit for jactitation of marriage, that it appeared on the face of the promovent's libel that he had no cauſe of ſuit, a *peremptory exception* in general terms, in the nature of a general demurrer, might be put in by impugnant.

If on the other hand the libel was perfect, but a bar is ſtarted by the impugnant, as for inſtance, that the cauſe was ſubſtantially tried before in a ſuit in which the preſent promovent might have

not taken from books, but collected from my own obſervations. See Heineccius ad Inſtituta, lib. 4. tit. 13. Proprie dicitur *exceptio* quando actori competit actio, quia eſt actionis excluſio, quando autem actori nullo actio competit, id quod opponit reus proprie vocatur *defenſio*. Lanfranci praxis, ch. 4. de exceptionibus: but by modern juriſts, the latter are called exceptions of fact, to diſtinguiſh them from the others, which are called exceptions of law; for in its moſt extended ſenſe, the word *exception* included both, and was omnis rei allegatio ac defenſio qua intentio actoris vel *ipſo jure* vel ob *æquitatem* eliditur.

Pleas in *excuſe*, or in *juſtification*, are ſo common in law, (though they have not been ſo ſtrongly diſtinguiſhed from other pleas as in the eccleſiaſtical court) that the above diſtinction which I have taken wants no comment. I will not ſay that the above diſtinction between matters *contrary*, and matters *contrary and defenſive* is accurately obſerved, but it ſeems to me the true one. A pleading is ſometimes called a matter *peremptory and defenſive*: for inſtance, a woman inſtitutes a ſuit for a divorce on account of cruelty, and for alimony, the huſband may plead adultery in her, which *peremptſ* her demand for alimony, and in ſome meaſure *excuſes* or defends his harſh behaviour.

intervened, the objection is urged in a pleading called alſo a *peremptory exception*, but in the nature of a *plea in bar*.

If no ſuch objections are in the power of the perſon of the impugnant, he may perhaps find defects in the form of the libel, e. g. for omitting the ſetting forth of time and place, or for not annexing documents therein referred to, and mark them by an *exception*, not called peremptory, but ſimply ſtiled an exception, which is in the nature of a demurrer *for want of form*. Or he may poſſibly object to the juriſdiction of the court, or plead that the promovent is a minor, not competent to inſtitute a ſuit, by *exceptions* in the nature of *pleas in abatement*.

But now let us revert to the ſecond caſe, and ſuppoſe that the impugnant has a plea in bar, and that it not only perempts the ſuit, but amounts to a juſtification, e. g. that he had a right to jactitate, for that a marriage had actually taken place; he, probably, inſtead of calling his plea a peremptory exception, will call it a *matter juſtificatory*; if on the other hand he cannot juſtify, but has matter of excuſe, e. g. that he did not boaſt or jactitate in order to hurt the good name of the promovent, but at her own earneſt requeſt and deſire, it will be called *a matter contrary and defenſive*.

If after all impugnant finds he has no occaſion to have recourſe to any of theſe defences, and is able to deny the fact, but fears that upon ſuch a

general iſſue he ſhall not be enabled to give in evidence ſpecial facts, ſupporting his denial, and making the charge of promovent impoſſible or improbable, he may put in ſimply a *matter contrary* (25), ſtating the defence ſpecially.

The promovent is now called upon to reply, which he may do in various ways: he may (according to the caſe) think proper to plead and conteſt the admiſſibility of the adverſaries' exception, which may be compared to joining in demurrer; or if it has been in the nature of a plea

(25) This laſt inſtance may perhaps be better illuſtrated in ſome other ſuit. Suppoſe in a ſuit for reſtitution of conjugal rights, the impugnant wiſhes not only to deny his marriage, but to ſhew the improbability of ſuch a marriage from the mean ſituation of the other party. Suppoſe in a ſuit for tithes, inſiſting upon a uſage, he might wiſh not merely to deny the uſage, but to ſhew ſomething quite inconſiſtent with ſuch an uſage. Again, ſuppoſe in a ſuit for a divorce for cruelty and expulſion from the huſband's houſe, the huſband ſhould plead condonation, and that the wife had come back and cohabited; and ſuppoſe that ſhe really had returned to the ſame houſe from neceſſity, but not *animo cohabitandi*, and had lived in a different wing of the houſe and never ſeen him, a bare denial would never do, without explaining all the circumſtances by a contrary matter; and here a queſtion may occur, whether after a negative conteſt, ſuch a contrary matter may be added upon further conſideration, and I have known it to be done. It may be aukward, but I ſee no inconſiſtency in it. In old pleadings, as I find by the regiſtry books, theſe *matters contrary* are ſometimes ſtiled allegations.

in bar, he may conteſt it negatively, or may perhaps put in a peremptory exception to it on his part, in the nature of a demurrer; or he may literally *reply*, as if the will of a woman deceaſed be alleged, B. may poſſibly plead that ſhe was married, and could not make a will.—A. replies that the marriage was void: but ſuch *ſpecial replications* are not frequent.

In the old books of Roman and civil law, we find mention of duplications, triplications (26), and quadruplications, anſwering to rejoinders, rebutters, and ſurrebutters, but they are very ſeldom in uſe.

The pleadings being arrived at their completion, the parties muſt at length have come to a direct iſſue or contradiction, not with the ſtrictneſs of our legal proceedings which require an iſſue upon a ſingle point, (though that point need not conſiſt of a ſimple fact) (27), but to ſome general denial and contradiction made by the laſt pleader of the exception, replication, or other matter immediately preceding—*Status ſit quæſtionis; judicii ſuſcepti utrinque facta eſt profeſſio*, i. e. the parties have agreed what is the queſtion really to be tried, and are ready to go into evi-

(26) Names formerly of pleadings of Engliſh law To go beyond a duplication was bad pleading. I have, among other precedents, one inſtance of a duplication, but I have ſeldom known it; however, in a late appeal of Evans and Napier, in Ireland, this whole train of pleading was gone through.

(27) Burr. p. 320.

dence; and here again the ambiguity of the terms litis conteſtatio occurs, and the parties are frequently in books ſaid at this ſtage to have arrived, and not before, at the *litis conteſtatio* (28).

(28) It is very remarkable that Oughton gives no expreſs chapter on theſe pleadings, nor any aid to the analyſis of them, nor treats of exceptions, except thoſe to *teſtimony*, ſo that I have been obliged to depend on obſervations and reflections, without any aſſiſtance from books. Oughton merely treats of the general negative conteſt to the plaintiff's libel, which is the only thing that he profeſſes to mean by conteſtation of ſuit; and Heineccius, though he admits that theſe words are ſometimes uſed in the ſenſe mentioned in the text above, evidently conſiders that as an abuſe of the words. If the rule of our law be the ſame with the civil, that no dilatory exception can be put in after conteſtation of ſuit, it becomes important to know the proper ſenſe of the words, a queſtion which has been diſcuſſed in the chapters on the civil law. Perhaps, after all, theſe ſuits reſemble the actions *bona fidei* of the Romans, in which this ſtrictneſs was unneceſſary. But though the ſtrict meaning which I have annexed to the conteſtatio litis of the civil law be acknowledged by Judge Blackſtone, who ſays, it is a general aſſertion that the plaintiff has no ground of action, yet in common practice Maranta's aſſertion is true, primus actus qui ſolet immediate fieri poſt litis conteſtationem, in cauſis in quibus lis conteſtatur habet, vim litis conteſtationis in cauſis in quibus lis non conteſtatur.

THE SECOND STAGE OF THE CAUSE IS FROM CONTESTATION OF SUIT TO CONCLUSION.

ADDITIONAL ALLEGATIONS.

The ſuit is now completely conteſted, and the parties ready to proceed to proof; but as I have hitherto, for the ſake of ſimplicity, conſidered the promovent as having only a right to put in one allegation (as a plaintiff at law files but one declaration) and as he has a right by the courſe of the court to put in three, each ſupporting and ſtrengthening the preceding, it is neceſſary to obſerve, that whatever has been ſaid hitherto of the one libel, muſt be conſidered as applying to each of theſe three, when they are put in; to explain this further, the promovent having received light from the pleading of the incumbent, amends his bill, to uſe a phraſe familiar to the equity lawyer, i. e. he files a ſecond allegation (for this part of the proceedings may be more juſtly compared to thoſe in our equity courts, than in thoſe of law), and in the ſame manner he may file a third; but he can go no further, though one would imagine from what is ſaid by Oughton, in the notes to titles 112 and 113, that formerly he could.

But though in ſome reſpect a compariſon may

thus be made with amended bills in our courts of equity, in others the compariſon totally fails. The oppoſite party always pleads to theſe allegations; and though he may be alſo called on to anſwer them article by article, never doth ſo unleſs particularly required, ſo, that upon the whole, the practice widely differs from that of courts of equity (29).

When the cuſtom of putting in theſe additional allegations originated I know not, for we find no mention in the ancient civil law of more than one *libellus*; and indeed, in ſtrictneſs of ſpeech, I conceive ſtill, that the firſt pleading or charge of the plaintiff, or promovent, is the only one properly called the *libel* (30). I can as little find

(29) In one reſpect it hath a manifeſt advantage, the power which each party hath to demand the anſwer of the other to every pleading that is put in; whereas a defendant in chancery cannot procure the anſwer of the plaintiff to any new matter or allegation brought forward by him in his anſwer, without filing a diſtinct allegation, viz. a croſs bill. The late Dr. Ratcliffe, whoſe practice had been entirely in the common law courts (where he arrived at the firſt eminence) until he was made judge of the prerogative, often told me, that in his opinion (and his opinion could not be biaſſed that way) the method of inveſtigating and coming at the truth in the eccleſiaſtical courts, was preferable by far to any that he knew.

(30) I conſider the libel as the declaration or bill of complaint. The additional allegations do not charge new or diſtinct cauſes of ſuit, but only new circumſtances and additional facts in confirmation of the original cauſe of action.

when the number was limited to three; for, as I have obſerved, Oughton ſeems to ſpeak of the number as only limited by the diſcretion of the court, or in conſequence of ſome rule ſerved upon the adverſary (31).

The defendant or impugnant has alſo a right to put in three defenſive pleadings; but in teſtamentary and adminiſtration cauſes, both parties are actors or plaintiffs, as at law in a replevin cauſe, and therefore you do not in them hear of *defenſive matters*, &c. &c. but each party puts in, or may put in, three *allegations*. The huſband charged with cruelty, or the wife with adultery, are to *defend* themſelves, but the party ſetting up a will, and his opponent ſetting up inteſtacy, are

Allegation *en termes de Palais* eſt la citation d'une autorité d'appuyer une propoſition. Encyclopedié of Diderot and d'Alembert. Paris, 1751.

Allegationes partium—*rationes* quas Reus & Actor producunt; hinc nata *noſtris* vox familiaris *alleguer* de eo qui inſtrumenta vel *teſtes* vel rationes pro ſuo jure tuendo profert. Du Freſne's Gloſſary. The word comes not from *allegare*, which is *ad alium mittere*, but from *alligare*, i. e. *ad ligare*, to tie or annex to.

(31) Eſt & alius modus refrænandi has *ſecundas*, & aliquando etiam *tertias* & *quartas* propoſitiones materiarum, ſive allegationum; tit. 112. note. The two methods appear by that and the following ſections: 1. Petendo expenſas retardati proceſſus; 2d. Aſſignando terminum infra quem —ad amputandas dilationes, ſi multiplicentur allegationes.

both plaintiffs and *claimants* of deceaſed's property upon different grounds.

PERSONAL ANSWERS.

We muſt alſo, before we proceed to depoſitions or proofs by witneſſes, conſider perſonal anſwers, which may prevent and anticipate the neceſſity of ſuch proof. The ſuit, which hitherto may have been compared to one at law rather than in equity, here aſſumes the latter form; for the promovent is at all periods of the cauſe after conteſtation, even down to the hearing, entitled to the aid of impugnant's anſwer upon oath; and if it be refuſed or delayed, he proceeds with nearly the ſame proceſs of contempt to enforce it, as was uſed to enforce the party's original appearance, with this difference (32), that where he is excommunicated for not anſwering, I have heard it ſaid, there is no occaſion for a citation to all effects, previous to proceeding with the cauſe, but the contrary ſeems to be the truth.

The impugnant of courſe cannot read his own perſonal anſwer; but if the promovent reads part of the anſwer to any one article, the impugnant

(32) In fact, each party is entitled to the anſwers of the other upon oath to every one of his pleadings, but to avoid complication and confuſion, I have ſimplified the ſubject by conſidering only the promovent and his libel. It is eaſy to generaliſe the rules above.

has a right to read the whole of the anſwer to that article.

Exceptions may be put in to theſe perſonal anſwers, as to an anſwer in chancery, for being ſhort, impertinent, or ſcandalous.

PROOFS AND DEPOSITIONS.

When the party from the ſtage of the cauſe is called on to proceed to proof, a term probatory is granted, within which witneſſes are to be produced, which, by the courſe of the court, lapſes, or is terminated on the next court day; this is thrice repeated, ſo that the three probatory terms would, by the ſtile of the court, lapſe on three ſucceſſive court days, if they were not continued (33), which they almoſt always are, and that for a conſiderable ſpace of time, ſince, in ſcarce any inſtance, could it be poſſible for the party to bring up witneſſes, perhaps living at a great diſtance, nor for the examiner to examine them, within the ordinary curial terms. The term probatory is common to both parties, i. e. each may examine during the time granted to the other, and as long as it continues; and there are three terms probatory granted on the putting in each and every

(33) This is done for a reaſonable and proper ſpace of time, till the witneſſes are examined, merely by the proctor, (when the regiſter mentions the ſtate of the cauſe) praying to continue; until the oppoſite party, or the judge, object to any unreaſonable delay.

one of the three allegations or pleadings, which each party is at liberty to put in or file; during which terms probatory, each party is at liberty to produce witneſſes, not only to the matters in the laſt allegation put in, but alſo to thoſe in all the preceding allegations, ſo that until publication, and as long as any term probatory is in exiſtence, the whole cauſe, and all the contents of all the allegations, are open to proof.

The term probatory runs, if the party who prayed it is delayed for want of the perſonal anſwer of his adverſary, only from that anſwer coming in; and though it may have lapſed, yet for ſpecial cauſe the party will be reſtored to a term probatory by the court: on the other hand, if the party obtaining it afterwards ſhould change his mind, and think it unneceſſary to examine further witneſſes, he may renounce it; except it has been granted in pain of the opponent's contumacy, who abſents himſelf, or except the other party has accepted it, and proteſted of uſing it as common to both, unleſs he ſo accepts it merely for delay, and afterwards doth not examine witneſſes, in which caſe he muſt pay coſts of proceſs retarded (34).

The witneſſes muſt be ſummoned to attend, either perſonally, or if they cannot be found, by a citation *viis et modis*, and their expences offered

(34) See Oughton, tit. 75.

them (35); and if they refuſe, may be excommunicated; but if they live out of the juriſdiction of the court, a requiſition muſt go to their own proper judge to examine them. The probatory term is naturally continued by contumacy of the witneſſes to give time to ſubdue it; but if the judge has reaſon to think that their abſence is the effect of any colluſion or trick to delay the cauſe, he may proceed to concluſion; but yet if they afterwards appear, and are abſolved, and their contempts purged, concluſion is reſcinded, and they may be examined (36).

The witneſſes not contumacious are produced in court within the probatory term, and ſworn; or if at a diſtance, a commiſſion iſſues to examine them (37). On their production, Oughton gives particular directions about the adverſaries diſſenting to their production, and proteſting of its nullity, which in practice is not now done, the adverſary merely ſwearing them to give true anſwers to his queries, in caſe that he means to croſs-examine them. Oughton ſays, that the

(35) This vatiæcum, by the courſe of the court, is uſually from one to four ſhillings a day while delayed, and four-pence a mile while on the journey.

(36) Oughton, tit. 78.

(37) Oughton ſays, in a note, title 80. though the witneſſes muſt be *produced* within the probatory term, they may be *examined* after it has lapſed, and ſo is the practice. All that is neceſſary, is to produce them within the time.

judge admoniſhes them to appear to be examined before the next court-day, or within ſome competent time, but neither is that the modern cuſtom (38). The party producing them gives notice to the opponent of the articles of his libel, to which he intends to examine them.

The witneſſes produced becoming thereby common to both parties, the adverſary may adminiſter to them interrogatories, which he muſt do within twenty-four hours, unleſs further time be granted (39). A copy of theſe interrogatories, according to Oughton, is not to be given to the opponent; and this croſs-examination doth not preclude objections to the witneſſes (40). The party producing them cannot impeach his own witneſſes, inſomuch that though he may afterwards chuſe to wave their examination, yet he cannot prevent the oppoſite party from croſs-examining them.

The witneſſes are to be ſecretly and ſeparately examined, not in the preſence of the parties or

(38) The court uſually admoniſhes them, that they muſt attend the examiner of the court to be examined, and that the examiner will give them due notice of the time.

(39) Each party may read the evidence given by his own witneſſes, as well as by thoſe of his adverſaries, on their croſs-examination.

(40) i. e. As I conceive, to their ſayings, for I apprehend he cannot afterwards object to their perſons. Oughton thinks, that interrogatories more frequently prejudice than aſſiſt the party offering them.

other witneſſes. Their depoſitions, after being read over to them article by article, and they aſked whether there be any thing which they wiſh to alter or amend (41),—are then to be ſigned by the witneſs, and be afterwards *repeated* before the judge, i. e. aſked again in the open court by the judge, whether there be any thing which he wiſhes to correct or alter. This is indiſpenſably neceſſary, becauſe though the examination is before the examiner, it is always preſumed, ſays Oughton, to be in the preſence of the judge.

If the witneſſes, through illneſs, impriſonment, age, or infirmity, are incapable of attending, although reſident, the judge, or his ſurrogate, or I ſuppoſe the uſual examiner, may attend and examine them at their own houſes; and if they live at a diſtance, they muſt be examined by commiſſion proceeding from the judge, if they are within his juriſdiction, otherwiſe letters requiſitory muſt go to the biſhop within whoſe dioceſe they reſide, requeſting him to examine, or have them examined, as it is called, *ſub mutuæ viciſſitudinis obtentu* from the mutual aid thus mutually granted by the ſeveral eccleſiaſtical juriſdictions.

(41) How much is this preferable in ſome reſpects to an examination at niſi prius, where every incautious or haſty expreſſion is inſtantly bellowed to the jury and inſiſted upon, without giving time to the witneſſes to correct a particle; or if he attempts to do it, perjury or prevarication is immediately charged on him?

I ſhall firſt conſider commiſſions iſſuing within the dioceſe where the cauſe ariſes. Theſe commiſſions uſed to iſſue to ſuch perſons as the judge might pleaſe, two or more being uſually nominated to him by the proctors of each party, for his approbation, originally eccleſiaſtics, but latterly very often laymen, empowering them jointly and ſeverally (42) to ſit and examine, at an appointed time and place (43), aſſuming to themſelves an actuary, i. e. a regiſter, properly among the notaries public, with a term aſſigned for tranſmitting or returning the commiſſion, and the term probatory is to be continued to the day of return, and proper notice (44) given to the oppoſite party of the time of opening and proceeding on the commiſſion.

Such was formerly the practice, a practice which Oughton himſelf obſerves is fraught with many miſchiefs, inaſmuch as the commiſſioners ſo nominated will naturally make themſelves parties, and be in danger of not examining indiffer-

(42) Such is the tenor of eccleſiaſtical commiſſions in general, except to the court of delegates, whoſe commiſſion runs *to you or two more of you*, ſo that one could not proceed.

(43) The place properly a church, now improperly very often an inn. The place, if in foreign parts, cannot be ſo definite.

(44) Which is three days, according to Oughton.

ently, and deviating into perpetual conteſts (45). The wiſdom therefore of judges in Ireland, and I take it for granted in England, has taken a hint from the ſuggeſtions of Oughton, and has, within theſe few years, ordered that no commiſſion ſhould be directed but to an officer of the court, and that the proctor of either party, if he chuſes to have the commiſſion attended, muſt do ſo either in perſon, or by a ſubſtitute, who muſt be a proctor (46).

When commiſſioners uſed to be appointed, the commiſſioners being aſſembled at the appointed time, were to accept the commiſſion, (and though ſome were abſent, they might ſubſequently accept it), and to appoint an indifferent perſon actuary, uſually a notary public; and to take care that one ſhould not be impoſed on them by the party bringing down the commiſſion, who might be partial to himſelf. Now that an officer of the court examines, who is probably a notary public himſelf, it is often thought unneceſſary to aſſume an actuary (47).

(45) See ſecond volume, p. 423, Practice of the Admiralty, note 35.

(46) See ſecond volume, p. 423, note 36, Practice of the Admiralty.

(47) The delay and expence of the old method of appointing commiſſioners, was to my knowledge extremely grievous. The preſent mode is a wonderful ſaving to the ſuitor, while at the ſame time his buſineſs is much better

The oppoſite party may join in the commiſſion to ſave expence, and examine his own witneſſes under the ſame: when the commiſſion goes down, he may adminiſter interrogatories, or if he does not chuſe by his proctor to be preſent, he may, at the time of ſpeeding the commiſſion, deliver in his interrogatories to the regiſter, not to be ſhewn to any perſon until the commiſſion be opened; but if afterwards he chuſes to be preſent by his proctor, theſe interrogatories may be ſubſtracted, and new ones adminiſtered: if no interrogatories be previouſly prepared, he uſually gets a reaſonable time from the commiſſioners below to prepare and bring in interrogatories, having only twenty-four hours in ſtrictneſs.

If the adverſe party doth not appear at the time of ſpeeding the commiſſion, he is to be thrice publicly called, and every thing is to be done in pœnam contumaciæ, *in pain* of his contumacy; and Oughton thinks, that if he doth not chuſe to be preſent, he ought to take care, at the time of granting the commiſſion, to proteſt of nullities, for that otherwiſe he cannot afterwards except againſt the witneſſes. Tit. 86. ſec. 11.

The certificate of the execution of the commiſſion is to be directed to the judge, ſubſcribed and

done by an examiner and proctors, well acquainted with the rules and practice of the court, in which the blunders of ſtrangers to it were innumerable and infinitely miſchievous.

ſigned by the perſons appointed to expedite the commiſſion, and containing all the acts done by virtue thereof. Every leaf of the depoſitions ſhould be ſubſcribed not only by the witneſſes, but alſo by the commiſſioners, and the whole carefully ſealed up with an authentic ſeal, until produced in the court from whence it iſſued, and aperture there prayed.

The manner of executing a commiſſion to examine witneſſes in another dioceſe (for no man can be cited to appear out of his own), doth not materially differ, except that it muſt iſſue and be directed to the biſhop of that dioceſe, or his vicar-general and official principal, and be attended with letters requeſting or praying them to compel the witneſſes to appear at a time and place which muſt be named in the requiſition, to examine theſe witneſſes, and tranſmit the depoſitions (48).

The court has ſometimes referred a queſtion of hand-writing, or forgery, to a convention, ſimilar to a jury, of proctors.

If the commiſſion is to be executed in foreign parts, it may perhaps be directed to the principal magiſtrate of the place, or his deputy; and in ſuch caſe, as it is difficult to aſcertain the exact time, the commiſſion may be more indefinitely directed to be executed between ſuch a day and

(48) I have known a regiſter of one dioceſe examine by conſent in another, but then he could have no power or proceſs to compel witneſſes.

ſuch a day, giving due notice a certain number of days before to the oppoſite party.

PUBLICATION.

Whenever the proctor of either party doth not intend to produce or examine any more witneſſes, he may pray publication, which ſometimes on ſpecial circumſtances is prayed, ſaving the examination or repetition of ſome particular witneſs. Publication may be ſtayed on ſufficient cauſe at the prayer of the oppoſite party, and putting in a new pleading upon his part (if the whole number allowed him be not out) is always ſufficient cauſe, and ſtays it of courſe; ſo that where each party chuſes to put in their three pleadings, and are ready with them, publication cannot paſs till theſe are all exhauſted, and the witneſſes to them examined; but the party which prays to ſtay publication, muſt be ready with his pleading at the time it is prayed; it is for the court to determine whether publication be unreaſonably or deſignedly delayed, or commiſſions tediouſly or improperly executed, and to act accordingly.

Publication having paſſed, and copies of the depoſitions being given out, if the witneſſes have not fully anſwered to interrogatories, the court will oblige them to anſwer more fully; if other exceptions appear to the teſtimony, the parties

will offer them. Theſe *exceptions to witneſſes* are either general or ſpecial, the former offering general objections, the latter ſpecifying particular facts, cauſes, and reaſons of exception; and each of them may be to the *perſons*, as that they are of infamous character, or to the *ſayings*, that they are contradictory, repugnant, or *extra-articulate* (49); and the party may, ſaith Oughton, demand the oath of calumny or malice (50) from him who excepts generally, to oblige him to ſhew that he doth not except for the ſake of delay.

Probatory terms are granted on theſe exceptions, and commiſſions to examine as in the principal cauſe.

The party to whoſe witneſſes exceptions are made, may bring others to *corroborate* them, and may alſo impeach the witneſſes produced to ſupport the exception, (who are called *reprobatory* of

(49) The objection to extra-articulate depoſitions is evident. The other party thus cannot know to what the witneſſes have been examined, and therefore cannot properly croſs-examine them—giving him a copy of the articles to which they are to be produced is ſo of little uſe to him. The examiners are very faulty when they ſuffer it.

(50) The form of the oaths of calumny and malice is found in Oughton, Burn, &c. I have never known them in practice, yet I have heard it ſaid, from high authority, that they may ſtill be adminiſtered, not only to proctors, but even to advocates—ſed *quere*.

the original ones), by others *reprobatory* of them, but the conteſt can go no further; according to the adage—*In teſtem teſtes, & in hos, ſed non datur ultra.*

Exceptions (51) ended, *inſtruments* or written documents remain, which if alleged in the libel, ſhould be produced before conteſtation of ſuit; in general they may be produced at any time before concluſion, or afterwards, if ſubſequently diſcovered (52); and I have known them allowed to be produced at the hearing, though alleged long before.

TERM TO PROPOUND.

Publication being paſſed, and the depoſitions known, if no exceptions to witneſſes intervene, or if they have been diſpoſed of, the *term to propound all things* follows; which means a term limited, within which the defendant is called upon, if he has any further proof or defence to make, to bring it forward; if, then, after all that has paſſed, the impugnant has any further defence to make, new witneſſes lately diſcovered without

(51) The party excipient, however, may corroborate his witneſſes alſo. Corroboration cannot aid thoſe to whom ſpecific objections have been put in, ſays Oughton, in a note to title 102.

(52) They are uſually alleged with theſe concomitant words, *which he proteſts of exhibiting in due time and place.*

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fraud or covin to introduce, or real objections to make to thoſe of his adverſary, which he could not make before, he may ſtill do it; but if he attempts any thing of this kind with intentions of delay, the ſagacity of the judge will induce repentance on him in a load of coſts: and if on the *day aſſigned to propound all things* he has no new defence or objection to make, *concluſion* follows. This term to propound all things, as Oughton admits, is not a creature of the ancient law, but an invention and uſage of judges in the latter times.

CONCLUSION.

Concluſion alſo Gail admits not to be *de ſubſtantia juris, or known to the civil law, though perhaps it was to the canon:* it is however plainly conformable to good ſenſe to put an end and concluſion to the ſuit, *malgré* any litigious perverſeneſs of the parties; and accordingly (53) *concluſion* forbids the filing any further allegations, or adducing any further proofs, even by inſtruments, except as far as leave is reſerved to exhibit

(53) So ſays Oughton, but in practice I have known them conſtantly, if records of courts, ſuch as bills in chancery, or public inſtruments, produced at the hearing upon leave obtained; on condition ſometimes of alleging them, that they may be impugned by the oppoſite party.

them at the hearing (54): and when concluſion takes place, the judge is prayed to *aſſign* a term to hear ſentence, and to inform on the next court day; on which day, or as ſoon as the judge may pleaſe, he hears the cauſe; advocates ſtate the caſe on both ſides, the depoſitions are read, council (55) are heard to evidence, and the judge is ready to proceed to ſentence.

To hear this ſentence, by the ancient practice a citation iſſued to the unſucceſsful party; but now, when he has once appeared, he is merely called, and ſentence paſſes in pain of his contumacy.

THIRD STAGE OF THE CAUSE—TO ITS TERMINATION.

SENTENCE—EXECUTION.

Concluſion having paſſed on the day aſſigned to conclude, the promovent prays a term to be

(54) The tedioufneſs of ſuits in the eccleſiaſtical courts is a common and trite topic of abuſe. I ſcarcely ever knew any one of them, even the moſt complicated, laſt two years. How few equity ſuits are ſo ſoon over!

(55) The common lawyers, though not allowed to ſign pleadings, are admitted to ſpeak in theſe courts in Ireland; for in that kingdom the common lawyer is not much diſtinguiſhed from the civilian; multiplicity of buſineſs has not produced diviſion of labour.

aſſigned to hear ſentence, and to inform, viz. on the next court-day, on which day information being given to the judge, i. e. he having heard the proofs read, and the ſtatement and arguments of council or advocates, proceeds, as ſoon as he is ſatisfied, to give ſentence (56), which is offered to him in writing by the proctor, ſigned by an advocate, and if approved, is then ſigned by the judge. As to execution, every one knows that where the ſentence doth not execute itſelf, if it be diſobeyed, the eccleſiaſtical power is only that of excommunication, in which it is ſupported and rendered formidable by the aid of chancery, granting, where the party continues obſtinate, the writ *de excommunicatio capiendo:* concerning which, I ſhall only obſerve, that all the churchmen inſiſt that this is a writ *ex debito juſtitiæ*, though my Lord Coke ſays, it is only *ex gratiâ*. But at all

(56) The order then of rules from publication, if no particular obſtacle be interpoſed, is thus;

1. Publication decreed.

2. The judge aſſigns to *propound* all acts next court-day.

3. On that day all acts being propounded, judge aſſigns to *conclude*, unleſs cauſe, next court-day.

4. On that day concluſion decreed, and judge aſſigns to hear ſentence, and to inform on next court-day.

5. On that next court-day, information and ſentence. Such is the ſcheme of Oughton; but in practice in Ireland there are three aſſignations to hear ſentence, in plenary as well as in ſummary cauſes, as will be ſeen preſently by the rules in Maddock *v.* Logan.

events, the biſhop's *ſignificavit* muſt ſhew ſufficient cauſe.

When it appears to a third perſon that his intereſt is any way concerned in any cauſe, he may *intervene*, proving his intereſt. This he may do in a matrimonial cauſe at any time, but in general he muſt proceed in the ſame ſtate in which the cauſe was when he intervened.

I ſhall only here add, that if the impugnant in a criminal cauſe has any countercharge to make againſt the promovent, it ought to be recriminated by way of what is called *reconvention*. Thus, if in a cauſe of defamation, the impugnant can retort the charge of defamation on the other party—if in a cauſe of divorce for adultery, the wife denies the charge, but in her turn ſeeks a divorce for cruelty—ſhe reconvenes the promovent, and files what is called a reconvential matter (57).

Having now done with *plenary* cauſes (58), I am to proceed to *ſummary*, but as thoſe of a ſum-

(57) To *convene*, in the Roman law, was a technical term, ſignifying to bring an action.

(58) I ſhall further illuſtrate the practice in a plenary cauſe, by the actual rules in one ſtrongly conteſted.

MADDOCK *v.* LOGAN.

Citation.—Certificate of the execution thereof continued *. Promovent filed a libel. Impugnant exhibited a-

* To continue a certificate of execution is to give further time to execute and certify. Every citation muſt be returned in the term in which it iſſues, or the next.

mary nature in the conſiſtorial court are but few, I will treat of them under the head of

PREROGATIVE COURT.

In this court, which is confined to teſtamentary and adminiſtration cauſes, (except as matrimonial, may come in incidentally, and that only

juſtificatory matter. Promovent admitted the ſame as far as, &c. under proteſt of excepting. Impugnant prayed promovent's perſonal anſwer to the articles of his juſtificatory matter—decreed accordingly. Impugnant alſo examined witneſſes to his juſtificatory matter, and they were croſs-examined.

Then the promovent put in an additional allegation, which the impugnant conteſted negatively; then the promovent moved for the perſonal anſwer of impugnant to promovent's additional allegation.

21ſt April, publication decreed.

5th May, aſſigned to propound all things.

9th May, all acts being propouned, judge aſſigned to conclude, unleſs cauſe next court day.

26th May, judge aſſigned to conclude unleſs cauſe this day, when impugnant, on petition and affidavit, prayed to be admitted a pauper.

16th June, that motion was heard and the petition refuſed, and then the judge aſſigned to conclude, unleſs cauſe next court-day.

20th June, in oppoſition to concluſion, impugnant prayed liberty to *allege* a letter and paper-writing affixed.

23d June, impugnant exhibited an additional juſtificatory matter, with two inſtruments annexed; this was conteſted negatively, and then the perſonal anſwer of promovent alſo ordered to this additional juſtificatory matter.

where there are bona notabilia, viz. to the value of five pounds in different dioceſes), all proceedings are ſaid to be ſummary, as they are alſo ſaid to be in the court of admiralty.

The ſtrict deſcription of a ſummary cauſe is that in which it is not neceſſary to give in a libel, but you may libel *viva voce* at the acts, and pray to proceed ſummarily; and the proctor for the impugnant is to diſſent, and this *infers* conteſtation of ſuit, for *expreſs* conteſtation is not neceſſary; and in which there is no aſſignation to *conclude*, nor *expreſs* concluſion. To part of this deſcription cauſes in the prerogative may ſeem not ſtrictly to anſwer, ſince the pleadings are in writing, and the depoſitions taken down in writing as in the conſiſtorial court, and each party conteſts

July 4th, perſonal anſwer given in to the additional juſtificatory matter.

It was then prayed that concluſion might paſs, and ordered, unleſs cauſe next court-day.

July 7th, being next court-day, impugnant, as cauſe againſt concluſion, prayed that the term of law might be aſſigned to him for proof of his additional juſtificatory matter. And affidavits being read for the promovent, the judge refuſed to aſſign the term of law, and decreed concluſion, and aſſigned to hear ſentence on the firſt aſſignation next court-day. Impugnant's proctor diſſenting and proteſting of grievance, and of appealing.

Nov. 7th, aſſigned to hear ſentence on the ſecond aſſignation next court-day.

Nov. 10th, aſſigned to hear ſentence on third aſſignation, and to be informed next court-day.

Nov. 17th, information and ſentence.

in writing the allegations of the other, ſo that great part of what has been ſaid of the practice of the conſiſtorial, applies to this court, except that all the cauſes being teſtamentary, and both parties plaintiffs, and no offence charged, you will not hear of matters defenſive, &c. &c. but as there is no term to propound or to conclude, they are juſtly called ſummary; for after publication paſſes, inſtead of praying a term to propound all things, the party prays the firſt aſſignation to hear ſentence, and if no cauſe ſhewn on that day, there is an *implied* or *inferred* concluſion, and he prays the third aſſignation, and to inform (59).

(59) CORRESPONDENT STAGES ACCORDING TO OUGHTON.

Plenary.	Summary.
The day appointed to propound.	1. Aſsign. to hear ſentence.
The day aſsigned to conclude.	2. Aſsign. to hear ſentence.
Aſsigned to hear ſentence and to inform.	3. Aſsign. to hear ſentence and to inform.

CORRESPONDENT STAGES IN PRACTICE.

Plenary.	Summary.
All things propounded.	1. Aſsign. to hear ſentence.
—— Concluſion.	2. Aſsigned to hear ſentence.
1. Aſsigned to hear ſentence.	3. Aſsigned to hear ſentence and to inform.
2. Aſsigned to hear ſentence.	
3. Aſsigned to hear ſentence and to inform.	

APPEALS.

An appeal is either from a grievance (60), or from a definitive ſentence or interlocutory decree, having the force of a definitive ſentence.

If before ſentence given, the judge, in the courſe of the cauſe, induces by his acts any grievance upon either party, as by his rejecting valid witneſſes or proper allegations, it is cauſe of appeal from the *gravamen.*

If ſentence being paſſed, a party finds himſelf thereby aggrieved, and that grievance appears on the face of the proceedings, he brings a *querele* of nullities; if he be aggrieved by matter intrinſic, he appeals.

The firſt kind of appeal, viz. from a grievance, muſt be made in writing, and muſt ſpecially contain the circumſtances of the grievance, as if proper teſtimony has been refuſed, and improper teſtimony admitted; the names of the witneſſes, and the matter or their evidence, muſt

(60) The diſtinction between the practice of the civil and canon laws, and between the practice of the court of admiralty and that of eccleſiaſtical courts, that by the former no appeal lies, except from a definitive ſentence or interlocutory decree, having the force of a definitive ſentence, is a diſtinction univerſally known. An interlocutory has the force of a definitive, when no other ſentence can be expected, e. g. if a peremptory exception be allowed in the outſet of the cauſe.

be ſet forth, and the appeal ſhould be interpoſed in ten days, for in England it has been doubted whether the ſtatute 24 Henry VIII. chap. 12. which ſpeak of fifteen days, applies to appeals from grievances; and in Ireland there being, as I apprehend, no ſuch ſtatute, the rule of the civil and canon law, which give ten days, muſt govern (61).

The ſecond kind of appeals, viz. from a definitive ſentence, may be viva voce in the preſence of the judge, *apud acta* at the time of the ſentence, or in writing before a notary public, within ten days; or in England, by ſtatute, in fifteen.

If the proctor appeals apud acta, he at the ſame time prays apoſtles, that is, ſhort letters dimiſſory, ſigned by the judge, ſtating ſhortly the caſe

(61) It was ſo determined by the delegates about three years ſince, in the cauſe of Lecky and Cave, where an attempt was made to conſtrue the law of Ireland otherwiſe, and to inſiſt that there was in that country no legal limitation of time in appeals.

In the caſe of the Rev. Mr. Symes, in the year 1800, it was doubted, on an appeal from a rule conſidered as a grievance, whether the day on which the rule was made was incluſive: on this point the following authorities may be uſeful; hodie cuilibet tribuitur ſpatium 10 dierum. Code lib. 7. tit. 62. 6. This Maranta interprets a die ſententiæ. 10 dies a recitatione ſententiæ, Nov. 23d. cap. 1. intra. 10 dies ex quo ſit gravamen, decretalium 11. Biduum vel triduum *ex* die ſententiæ latæ computandum. Decreti 2 pars. Cauſa 2. Diſ. 6.

and the ſentence, and in the room of apoſtles declaring that he will tranſmit all the proceedings.

If the party or his proctor doth not appeal *apud acta*, he may, diſſenting at the time of the ſentence afterwards, appeal *in ſcriptis* (62) within ten days in Ireland, and fifteen in England, by going before a notary, who draws up an inſtrument of appeal, containing a ſhort account of the nature of the cauſe or the ſentence, ſigns it before witneſſes, and puts his ſeal to it, and thus it becomes authentic.

At the time when apoſtles are prayed, and granted, a time is appointed within which the party is to retrocertify to the judge *a quo* what ſtep he has taken, who otherwiſe will proceed to execute his ſentence. The apoſtles when granted

(62) It is incumbent on the proctor to appeal in one of theſe ways, unleſs otherwiſe directed by his client, for if he omits to appeal from a definitive, and any damage thence enſues, he is liable to an action to be brought by his client.

Appealing apud acta may ſometimes be very neceſſary, as for inſtance, to prevent a perſon who has got adminiſtration by ſentence from inſtantly intermeddling with the effects; at other times it may be expedient not to appeal apud acta, as if it apprehended that the judge will aſſign too ſhort a time to retrocertify. See Oughton, tit. 294.

For the advantage of appealing in writing *in ſcriptis* from an interlocutory having the force of a definitive ſentence, ſee Oughton, title 295.

(63), (if it be an appeal from a metropolitical or from the prerogative court), are carried to the lord chancellor's ſecretary, and upon the back of them the chancellor names commiſſioners, or judges delegates, and the commiſſion being made out, two of them at leaſt muſt accept it, which they having done, iſſue an *inhibition* to the judge below to ſtop all further proceedings, and a *monition* to tranſmit all the paſt proceedings, and this *tranſmiſs* ſerves in the room of further apoſtles.

If the appeal be from a dioceſan to a metropolitical court, the apoſtles are in the ſame manner carried to the archbiſhop's vicars general, who then iſſues an *inhibition* and *monition*, and has the *tranſmiſs* made to him in like form as in the caſe before mentioned. This monition according to Oughton, tit. 312. may be prayed at any time before the term probatory aſſigned.

If the appeal be from a grievance, and it be proved to the ſatisfaction of the delegates, or admitted by the party appellate, the cauſe is retained above, and the delegates go on to hear the whole merits (64).

(63) See ſecond volume, Admiralty Practice, p. 438, note 53.

(64) But why in common reaſon, ſhould not the appellate have a power, if he chuſes, though it be determined *male appellatum* to retain the cauſe above? the appellant cannot

The cauſe muſt be proſecuted within a certain term, i. e. the appeal proceeded on, and this term is two fold, *terminus juris*, and *terminus hominis*; the latter ſignifying the limit of time within which the judge has bound the party to proceed on pain of his otherwiſe executing his ſentence; the other the boundary aſſigned by the law in caſe none be aſſigned by the judge, which is one year, called *primum fatale*, becauſe under ſpecial circumſtances a ſecond year may run called *ſecundum fatale* (65).

The appeal proceeding, an appellatory libel is exhibited, this is conteſted or anſwered by the oppoſite party, the depoſitions are read from the tranſmiſs in which all the proceedings below are

object (for the reaſon above) to the *judex appellationis*, why ſhould the perſon appealed be obliged to confeſs a grievance and pay coſts in order to retain the cauſe above, if he wiſhes ſo to do? it appears to me that the caſe of Williams *v.* Lady B. Oſborne, in Strange's Reports, proves that he can. The court of appeal there, finding that the appeal which was from a collateral matter after ſentence was merely for delay, though they decreed male appellatum, retained the cauſe above *ad inſtantum* partis appellatæ, & Conſett, part 5. Sec. 1. page 242. ſpeaks of the party appellate not confeſſing the grievance, but having a mind to avoid ſuit and future charges, and therefore conſenting to the judge of the appeal, and agreeing to proceed in the principal buſineſs.

(65) See ſecond volume, p. 440, Admiralty Practice, note 55.

made up in the form of a book; advocates are heard, and the delegates proceed to pronounce ſentence (66), and according to their judgment decree *bene* or *male appellatum*; and in the latter caſe, approving of the ſentence of the judge below ſend back the whole cauſe to him with all its incidents, to be by him carried into execution; or they may, if they pleaſe, though they remit the cauſe, retain the taxation and enforce payment of the coſts (67).

It remains to be obſerved, that the proceedings in cauſes of appeal from grievances are ſimilar (68) to thoſe in appeals from definitive ſentence, as to conteſtation of ſuit, concluſion, and other judiciary and ordinary acts; and if the principal or original cauſe be plenary or ſummary, ſo will alſo be the cauſe of appeal, ſave only that all the proceedings before the court of delegates are ſummary.

There is however one remarkable exception to this ſimilarity of proceedings in appeal from *gra-*

(66) In omnibus eſt petendum & per judicem decernendum, ut in datione libelli in prima inſtantia. Oughton, tit. 12.

(67) Appeals proceed in like manner from criminal cauſes, whether of the *mere office*, or *office promoted* by the proctor of the office; or whether *voluntarily promoted* by a perſon unintereſted, or *ex inſtantia partis* by the party injured.

(68) See Oughton, title 285.

vamina and from definitive ſentence, which is that in the former the party is not allowed *non allegata allegare, & non probata probare.*

This rule is the very converſe of that followed on appeals to the houſe of lords (69) and Mr. Juſtice Blackſtone has obſerved that it is a practice unknown to our law (though conſtantly followed in the ſpiritual courts) when a ſuperior court is reviewing the ſentence of an inferior, to examine the juſtice of the former decree by evidence never produced below (70).

This remarkable rule that in appeals from definitive ſentence either party may, *non allegata allegare, & non probata probare,* is found in (71) the Code, lib. 7. tit. 63. 4. and in the Clementines, lib. 2, tit. 8. ch. 2: it is in both places reſtrained, to *new articles, novi articuli ex veteribus pendentes, & ex illis orientes, & ad cauſum*

(69) See Brown's Caſes in Parliament, Vol. I. p. 70.

(70) 3 Blackſtone's Commentaries, p. 455. Yet in the caſe of Rochfort *v.* Nugent, 1 Brown's Caſe in Parliament, p. 590. The houſe of lords ſeems not to have ſtrictly followed their rule: a common recovery having been there proved in the court below, the party was allowed to produce and prove before the court of appeal a deed to lead the uſes, not mentioned below. On a bill of review in chancery, evidence newly diſcovered, is produced.

(71) See alſo Gail, lib. 1. Obſerv. 128. Maranta, pars 6. De Appellat. Baldus in 7m. Codis. Maſcardus; Farinacius p. 162. and 596.

pertinentes. On the ſame article exhibited below to which proof was adduced or their direct contraries, no new evidence can be produced; but on thoſe exhibited below, but not proved, there may: and ſo to new articles; which may be exhibited, if they are not upon perfectly new matter, ariſe from the former and ſpring out of them, and are related to the cauſe.

The rule of *non allegata allegandi, non probata probandi,* hath alſo this tack to it, *modo non obſtet publicatio teſtium.* The new allegation or proof therefore muſt be ſomething which ſhould not be *ſuggeſted* or occaſioned by the *evidence* already publiſhed, though it ſhould *ſpring* out of the *pleadings* below. Yet what room for controverſy is here? Deeds and written inſtruments are uſually admitted, but may not a party have been prompted to forgery as well as perjury, by ſeeing the ſtrength or weakneſs of his own or his adverſaries cauſe below. The reader (72) will judge by the examples in the note, how far the civilians have elucidated this rule.

(72) The civilians have thus illuſtrated this rule by examples, to ſhew that the *ſubject* of the ſuit cannot be changed; they, ſay qui petit bovem, in appellatione equum petere non poteſt; in like manner I conceive the ground and foundation of the action could not be changed: he who

CRIMINAL CASES.

The proceedings in theſe are, as we have ſeen them to be in the canon law, by *inquiſition or inquiry, accuſation, and denunciation.* In the firſt mode, in which the biſhop or his official pro-

relied on a written will, could not afterwards reſt on a deed, nor on a nuncupative will. But I have known a deed produced *above*, to corroborate a will alleged *below*, by ſhewing that the teſtator had always entertained bountiful intentions to the deviſee.

Baldus commenting *in cum codicis de appell.* illuſtrates this rule. Payment, ſays he, or a releaſe ſince the decree, is a novum capitulum, quod oritur ex veteribus, and therefore may be allowed on appeal; but if an action were brought for a thing againſt the vendor, and he pleads that he never ſold, he ſhall not on appeal ſay that he never was paid and therefore refuſes to deliver that thing, for this is a capitulum omnino novum. So a plea of a pact *de non petendo* put in below; defendant ſhall not be allowed to go on *preſcription* above. So objection to the perſon of the ſuitor not made below, plea of *bonnitus* cannot be made above.

But if plaintiff below has proved a right of property, he may above prove a right of poſſeſſion.

Si filius obtinuit in aditione hæreditatis, & in appelle, reus vult probare eum repudiaſſe, novum eſt capitulum, ex veteribus non pendens; actor in prima cauſa non probavit de jure accreſcendi, in appellatione poteſt.

Actor in publiciana non probavit titulum, poteſt in appellatione, quia Publicianæ conjunctum.

ceeds from the *mere office* (73), induced by public fame or the relation of creditable perſons to inquire into the innocence or criminality of perſons within his juriſdiction, the party appearing, has articles exhibited to him, which (ſays Oughton) he is bound to anſwer upon oath, *not to criminate himſelf* but ſo far as relates to the fame and the Judge's juriſdiction; and as if he refuſes to appear he may be excommunicated, ſo if he refuſes to anſwer after being thrice admoniſhed, he is to be pronounced contumacious and the articles taken for confeſſed, and then Oughton goes on to ſay that if he does confeſs the ſame he is obliged to anſwer to criminous poſitions, that is, he is obliged to criminate himſelf (74).

(73) But though he may exhibit articles from the mere office, he generally appoints one of the proctors to be the proctor or promoter of office, and appeals in cauſes of correction conſider that proctor as the promovent, and the Judge. This proctor is called a *neceſſary* promoter, and therefore the proceedings are ſtill *ſummary*.

(74) How to reconcile theſe contradictions I confeſs I do not know, eſpecially as the note refers us to the Engliſh ſtatute 13 Ch. II. c. 12. as in the caſe of Goulſon and Wainwright, 1 Sid. 374, it was determined that if articles *ex officio* are exhibited in the ſpiritual court for matters criminal, the party may plead that he is not bound to anſwer, and may have a prohibition; but in a mere civil ſuit he is bound to put in a perſonal anſwer. No act ſimilar to the above-mentioned ſtatute of Charles has paſſed in Ireland; it may be a quere, whether it be not virtually aboliſhed in

If he denies the ſame, or admits, it but denies the fact, witneſſes are to be examined and proofs produced as in other ordinary cauſes, and the proceedings in all ſuch cauſes of correction *ex mero officio* or of the office *neceſſarily* promoted are *ſummary*; and if the impugnant doth not appear, the witneſſes being examined and their ſayings publiſhed, definitive ſentence may be paſſed in his abſence, he having firſt been cited *de novo* to hear ſuch ſentence. If the impugnant appears he may except againſt the adverſaries witneſſes, and reprobate their ſayings, and before publication propoſe any defenſive matter in his favour.

The witneſſes muſt ſhew the grounds of ſuſpicion, and with whom and upon what foundation the fame reſted, which if it appears to have ariſen from folly or malignity, it is frivolous and falſe rumour and not public fame; and the impugnant, ſays Oughton, is not bound to anſwer ſuch criminous poſitions, nor to accuſe himſelf of them. If the crime be proved, the judge proceeds to concluſion as in other *ſummary* cauſes,

Ireland, but at the laſt viſitation in the college of Dublin, it was aſſerted that it remained in full force. If ſo, ſurely ſome law ought to be introduced to aboliſh it, and put us on footing with our ſiſter kingdom.

The act of 6 Geo. I. in Ireland, ch. 6. ordains that no citation ex mero officio ſhall iſſue unleſs the crime is charged to have been committed within two years before. This act ſpeaks of the oath of purgation as ſtill in force.

and paſſes a definitive ſentence according to the nature of the crime, with coſts againſt the criminal perſon; and though it be not proved, if vehement preſumptions and circumſtances of great ſuſpicion offer themſelves, canonical purgation, ſays Oughton, may be required from the party, in which if he fails, public penance may be impoſed on him, and in ſome caſes he may be excommunicated.

Accuſations or ſuits from the *office voluntarily promoted* are *plenary*; they admit of replications, duplications, &c. but the accuſer is liable to ample coſts if he accuſes without reaſon (75).

Denunciations or *preſentments* by church-wardens and ſideſmen are ſo entirely out of uſe, from the danger to which ſuch preſenters were liable from the juſt actions that might be brought againſt them, and in Ireland by the ſpecial proviſions of the act 6 Geo. I. chap. 6. that they need here only be mentioned.

This act provides that *voluntary promoters* and *preſenters* of offences ſhall be examined on oath before the citation iſſues, and the examination reduced to writing, and the promoter failing in proof, condemned in double coſts, but this not

(75) It appears to me, that the ſpirit of the civil law was exactly ſimilar to ours as to criminal pleadings, that after all exceptions were over-ruled, the *litis conteſtatio*, or pleading the *general iſſue*, was ſtill open to the priſoner.

and of Damhouder, and the clear diſquiſitions on the ſubject in the Speculum Durandi. I ſhall conclude with the ſober, charitable, and moderate advice of Oughton to the promoters of criminal ſuits, which however painful, are too often neceſſary. Let them examine well, whether their charges are grounded on good evidence or vehement preſumptions, and whether public fame however general and prevalent even among good and grave men originate in truth or in private malice and idle rumour, leaſt otherwiſe they ſubject themſelves to ſuits both in the temporal and ſpiritual courts, and to the diſtreſſing reflection of having injured the innocent.

Theſe cautions are now leſs requiſite ſince the ſtatutes have curbed theſe proſecutions, and added to the moderation of the times, confined within proper and ſalutary limits.

APPENDIX.

APPENDIX.

FURTHER CASES ILLUSTRATIVE OF THE PRECEDING WORK.

MANUMISSION.

Keane *v.* Boycott, A. D. 1795.
2 Hen. Blackſtone's Rep. 511.

QUESTION ſtarted in this caſe, whether a maſter in the Weſt Indies entering into a contract with a ſlave does not manumit him? the affirmative favoured by L. Ch. J. Eyre, condemned by the reporter, who inſiſts that a ſlave cannot be manumitted by implication*.

MARRIAGE.

Ilderton & Ilderton, A. D. 1793.
2 H. Bl. 145.

A marriage in Scotland between perſons who do not go thither for the purpoſe of evading the laws of England, will entitle the woman to a dower in England.

DONATIO MORTIS CAUSÀ.

Hill *v.* Chapman.
2 Brown, 612.

Gift of bank notes in a paper, accompanied with declarations, though not in *extremis*, a good donatio mortis cauſa.

* The author did hope that, before the publication of this ſecond edition, the noble and pious efforts of Mr. Wilberforce in the ſenate, and Mr. Giſborne in the cloſet, aided by the wiſhes of all good men, would have put an end to the horrid crimes of the ſlave trade. Alas! he has *lived* to ſee it acquire freſh vigour, and triumphant pretences to juſtification both in England and France.

N. B. this contradicts the maſter of the rolls, Millar and Millar, 3 P. Wms.

COLLEGES*.

Bently *v.* Biſhop of Ely.

2 Strange, 913.

Court ſaid it was a queſtion they would not determine, whether when the crown has given ſtatutes and appointed a viſitor, the ſucceſſor can any way alter or annul the former ſtatutes: the practice indeed has been otherwiſe, but it has never been determined to be good.

Attorney General *v.* Stephens.

1 Atkyns, 360.

Queſtion made in chancery whether fellow of a college has a right to let his chambers; court refuſed to determine, and ſaid it ought rather to be determined by the viſitor; the queſtion was on Dr. Radcliffe's fellowſhips: ſaid they ſuppoſed he had not left his fellows under greater reſtrictions than thoſe of other colleges are liable to.

Ex parte Wrangham, A. D. 1795.

2 Veſey, Jun. 609.

Petition by Wrangham to the Lord Chancellor, as viſitor of Trinity-Hall, Cambridge, (there being no heir of the founder) to declare the election of a fellow void, and to order the petitioner to be admitted, the court of king's bench having in a ſimilar caſe declined juriſdiction; the ſtatutes run thus: "Quod *in loco* ſocii ſubrogetur ſcholaris "idoneus *moribus* & ingenio qui per tres annos continuos "ad minus jura canonica aut civilia audivit in univerſitate "aliqua approbata:" with ſome exceptions not here material.

Petitioner inſiſted that he anſwered this deſcription, and yet a member of another college was elected. The electors defence was in general terms, that Wrangham

* See Prynne's work on the 4th Inſt. is a repoſitory of knowledge relative to colleges.

was not in their opinion a fit and proper perſon to be elected into the vacant fellowſhip. Lord chancellor decided againſt the petition; he was of opinion that the word *mores* has not only the more reſtrained ſenſe of *morals*, but alſo the more extended one of *manners*, and that a *diſſimilitudo morum*, jarring tempers, diſcordant diſpoſitions might mar the purpoſes of ſuch inſtitutions; and that of the diſpoſition, as well as learning and manners, the ſociety were to judge, not arbitrarily or whimſically, but by ſound diſcretion, and upon due conſideration of the ſtatutes.

Quere, Though I do not mean in the leaſt to diſpute the authority of the determination of that high court in the above inſtance, to what dangerous latitude might it lead if ill underſtood: I ſhould wiſh therefore that every academic would read the caſe at large, and not truſt to any abridgement of it.

Wyme *v.* Bampton.

3 Atkyns, 473.

The dean and canons of Sarum on renewing leaſes were accuſtomed to take fines, and if any of the canonrys were vacant, to divide them among the exiſting members. A canon, who came in after a leaſe renewed during a vacancy, ſued for his ſhare in chancery, and recovered.

PROTEST OF CERTAIN LORDS

AGAINST COMMITTING THE PROTESTANT DISSENTERS BILL, MAY 3, 1782.

Referred to in the Chapters on Marriage above.

Hodie ſecunda vice lecta eſt billa, entitled, an Act for the Relief of Proteſtant Diſſenters, in certain matters therein contained,

It was reſolved in the affirmative, that the ſaid bill be committed.

Diſſentient,

Firſt, Becauſe it is apprehended that this bill profeſſing to allow proteſtant diſſenting teachers to celebrate marriages between proteſtant diſſenters, may encourage almoſt every ſpecies of clandeſtine and improvident marriages, not only between proteſtant diſſenters of all denominations, but between proteſtants and the eſtabliſhed church: for it is apprehended, that neither by this bill, nor by any other law now in being, can it be aſcertained whether the parties be or be not proteſtant diſſenters, ſo that any man and woman who may have gone once or twice to a meeting-houſe, or to hear a field preacher, and calling themſelves proteſtant diſſenters, may be married under the ſanction of this bill by a proteſtant diſſenting teacher, whether he be a preſbyterian teacher, an independent teacher, an anabaptiſt teacher, a moravian teacher, or any other proteſtant diſſenting teacher whatſoever. Nay, it is apprehended, that a degraded popiſh prieſt, a degraded clergyman of the eſtabliſhed church, and by the 6th George I. chap. 5. ſec. 8. any man whatſoever pretending to holy orders, and taking the oaths and ſubſcribing the declaration therein preſcribed, has under this bill a right to ſolemnize marriages; and therefore the loweſt and moſt profligate men in the ſtate may inſtantly qualify themſelves for that purpoſe.

Secondly, Becauſe it is apprehended that ſuch marriage may not only be celebrated by all ſuch perſons, but that as this bill makes marriages ſo celebrated good and valid to all intents and purpoſes whatſoever, thoſe marriages are ſo far privileged, that there can be no divorce a *vinculo*, for precontract, conſanguinity, or impotence; for this bill gives to ſuch marriages all the right and benefits of thoſe celebrated by the clergy of the eſtabliſhed church, but does not ſubject them to the ſame objection.

Thirdly, Becauſe it is apprehended that under this bill marriages may be celebrated by all proteſtant diſſenting teachers with abſolute impunity to themſelves, between

parties within the prohibited degrees of kindred, without publication of banns, without licence, in a private place at any hour of the night, without witneſſes, without regiſtering ſuch marriages, between minors, and without the conſent of parents, guardians, or of the lord chancellor, though ſuch tranſgreſſions would ſubject a clergyman of the eſtabliſhed church to deprivation if beneficed, and to degradation if not beneficed, and in the caſe of a popiſh prieſt would be felony without benefit of clergy, and by making ſuch marriages heretofore had good and valid, legal heirs may be robbed of their inheritance by this *ex poſt facto* law.

Fourthly, Becauſe this bill makes valid to all intents and purpoſes whatſoever, all matrimonial contracts heretofore entered into between proteſtant diſſenters, and ſolemnized by proteſtant diſſenting teachers, whether ſuch matrimonial contracts were conſummated or not, from whence it is apprehended, that ſuch contracts, not conſummated, will, by this *ex poſt facto* law, be of force to make void ſubſequent marriages conſummated, and to ſubject women who are now lawful wives to be divorced, and their children to be baſtardized, although by the 33d Henry VIII. chap. 6. and the 12th Geo. I. chap. 3. no contract of marriage, celebrated even by a clergyman of the eſtabliſhed church but not conſummated, ſhall make void a ſubſequent marriage which was conſummated.

Fifthly, Becauſe this bill, by veſting generally in proteſtant diſſenting teachers without diſtinction an unregulated power of celebrating marriages, expoſes diſſenters themſelves and their children to all the evil conſequences attendant upon clandeſtine and improvident marriages equally with members of the eſtabliſhed church.

And of the numberleſs ſects of proteſtant diſſenters no one denomination of them is guarded by this bill againſt clandeſtine and improvident marriages to be celebrated between perſons of their perſuaſion by diſſenting teachers of any other denomination whatſoever,

Sixthly, Becauſe it was admitted in debate, that this bill is extremely defective; yet it was argued that it ought to be paſſed, becauſe it may be hereafter amended, an argument which it is conceived would rather juſtify the rejection of a bad bill, to which this branch of the legiſlature is fully competent, than ſupport the paſſing of ſuch a bill, with a view to a future amendment of it, which cannot be obtained but by the concurrent agreement of all branches of the legiſlature; for this argument would juſtify the commiſſion of an actual evil, which might be avoided, in order to apply a future remedy that poſſibly might never be obtained.

Seventhly, Becauſe thoſe who oppoſed this bill did repeatedly declare themſelves willing to vote for another bill, rendering all matrimonial contracts of marriages heretofore entered into between proteſtant diſſenters, and celebrated by proteſtant diſſenting miniſters or teachers, as good and valid to all intents and purpoſes, as ſuch contracts of marriages would have been if celebrated by the clergy of the eſtabliſhed church; and alſo rendering all matrimonial contracts or marriages hereafter to be entered into between proteſtant diſſenters, and celebrated by proteſtant diſſenting miniſters or teachers, of their reſpective own congregations, under proper regulations, as good and valid to all intents and purpoſes, as ſuch contracts or marriages would be, if celebrated by the clergy of the eſtabliſhed church.

Richard, Armagh,
Belmore,
Shannon,
Tracton,
R. Dublin,
Henry, Meath,
William, Waterford,
Clanwilliam,
Milltown,
Iſaac, Cork and Roſs,
Walter, Clonfert,
Charles, Caſhel,
Bellamont,
Enniſkillen,
James, Raphoe,
Carlow,
James, Downe and Connor,
Antrim,
Richard, Cloyne,
J. D. Leighlin and Ferns,
Charles, Kildare,
Charles, Elphin.

Act referred to in Chapter 6th, Book 1.

Anno regni triceſimo quinto

Georgii III. Regis Chap. 23*.

An act to explain and amend an act paſſed in the tenth and eleventh years of the reign of King Charles the Firſt, entitled, an act for preſervation of the inheritance, rights, and profits of lands belonging to the church, and perſons eccleſiaſtical.

Whereas doubts have ariſen as to the validity of leaſes made under the powers given by an act paſſed in the tenth and eleventh years of the reign of King Charles the Firſt, entitled, an act for preſervation of the inheritance, rights, and profits of lands belonging to the church, and perſons eccleſiaſtical; be it enacted by the king's moſt excellent majeſty, by and with the advice and conſent of the lords ſpiritual and temporal, and commons in this preſent parliament aſſembled, and by the authority of the ſame, that it ſhall and may be lawful to and for archbiſhops, biſhops, deans, deans and chapters, archdeacons, prebendaries, and other dignitaries eccleſiaſtical, parſons, vicars, and likewiſe maſters or governors and fellows of colleges, and maſters and guardians of hoſpitals, from time to time to accept of a ſurrender or ſurrenders of any leaſe or leaſes of any lands or hereditaments, and thereupon to demiſe ſuch lands or other hereditaments belonging to their reſpective ſees, churches, colleges and hoſpitals, (the dwelling houſes uſed for any their reſpective habitations, and demeſne lands thereunto belonging, and therewith uſed and occupied as the demeſnes of their ſaid houſes only excepted,) unto the perſon or perſons, in ſuch manner and form as by the ſaid act, or any other act or acts now in force they are enabled ſo to

* This remarkable act, which changed a law conſidered as ſacred for two centuries, but in which change of times may have required mutation, is here introduced to elucidate the notes to Chap. 6. part 1.

do, notwithſtanding that upon ſuch leaſe and leaſes there ſhall not be reſerved and continued due and payable unto the leſſors, and their ſucceſſors, during the term of twenty-one years, ſo much yearly rent or profits, or more, as the moiety of the true value of the lands or other hereditaments, *communibus annis*, at, or immediately before the time of making ſuch leaſes ſhall amount to.

2. And be it further enacted, that all leaſes heretofore made by any of the perſons aforeſaid, of any lands or other hereditaments belonging to their reſpective ſees, churches, colleges, and hoſpitals, except as before excepted, unto any perſon or perſons, in ſuch manner and form, as by the ſaid act, or any other act now in force, they are enabled ſo to do, ſhall be valid and good, notwithſtanding there was another leaſe, or eſtate, then in being, which did not expire, nor was ended and determined within the time in ſaid recited act mentioned, and alſo notwithſtanding that upon ſuch leaſe and leaſes, there were not reſerved and continued due and payable unto the leſſors during the term of twenty-one years, ſo much yearly rent or profits, or more, as the moiety of the true value of the lands, or other hereditaments, *communibus annis*, at, or immediately before the time of making ſuch leaſes did amount unto; provided that the yearly rent or profits which have been, or ſhall be reſerved upon every ſuch leaſe heretofore made, or hereafter to be made, ſhall not be leſs than the yearly rent or profits paid, and payable thereout for the laſt twenty years preceding the making of ſuch leaſe, whether ſuch lands or hereditaments, be augmentation lands or others.

3. And whereas, in many inſtances, lands and hereditaments belonging to archbiſhops, biſhops, deans, deans and chapters, archdeacons, prebendaries and other dignitaries eccleſiaſtical, parſons, vicars, and likewiſe maſters or governors and fellows of colleges, and maſters and guardians of hoſpitals, in right of their reſpective ſees, churches, colleges and hoſpitals, upon ſurrender of the leaſe or leaſes

then in being thereof, have heretofore been, and may hereafter be demiſed by one leaſe only, and have been, or may be afterwards, ſeparated and demiſed by two or more diſtinct leaſes, with ſeparate and diſtinct rents reſerved thereon reſpectively; be it enacted, that in all ſuch caſes, whether ſuch lands and hereditaments are augmentation lands or others, or both, that each and every of ſuch ſeparate leaſes ſhall be as good and valid in law, as the ſaid original one leaſe would have been.

4. Provided always, that the ſeveral yearly rents reſerved, or to be reſerved on ſuch ſeparate leaſes, do amount together to a yearly rent and profits, not leſs than the yearly rent and profits reſerved and payable by ſuch one original leaſe, any law, uſage, or cuſtom to the contrary notwithſtanding; provided that nothing herein contained ſhall be conſtrued to authorize any of the perſons or bodies corporate aforeſaid, to make any concurrent leaſe, other than what they could reſpectively have made before the paſſing of this act.

END OF THE ACT OF PARLIAMENT.

MEMORANDUM.

The two following extracts from Iriſh acts of parliament, have been inſerted, from my obſervation how much at a loſs gentlemen, particularly in England, have been, to know how our law was affected by the tenantry bill, and what acts paſſed in England are now of force in Ireland, ſince the ſtatutes recognizing the independence of Ireland in 1782; *they are not totally irrelative to the ſubject, the firſt being compared with the emphyteuſis of the civil law, the latter neceſſary from the continued compariſon carried on in the notes between the civil and our law.*

" The ſtat. 19 and 20. Geo. III. ch. 3. enacts, that " courts of equity upon adequate compenſation ſhall re- " lieve tenants and their aſſigns againſt lapſe of time, if " no fraud proved, unleſs it appear, that the fines were " demanded, and refuſed or neglected to be paid within a " reaſonable time. Provided, that if the landlord has " any difficulty in diſcovering the tenant, in order to make " the demand, then demand on the land, with notice in " the Dublin and London Gazettes, ſhall be ſufficient.

" The ſtat. 21 and 22. Geo. III. ch. 48. enacts, that " all ſtatutes heretofore made in England or Great Britain, " for the ſettling and aſſuming the forfeited eſtates in the " kingdom of Ireland, and alſo all private ſtatutes made in " England or Great Britain, under which any lands, tene- " ments, or hereditaments in Ireland, or any eſtate or " intereſt therein, are or is, holden or claimed, or which " any way concern the title thereto, or any evidence re- " ſpecting the ſame; and alſo all ſuch clauſes and provi- " ſions contained in any ſtatutes made in England or Great " Britain, concerning commerce, as import to impoſe equal " reſtraints on the ſubjects of England and Ireland as of Great " Britain and Ireland, and to entitle them to equal benefits; " and alſo all ſuch clauſes and proviſions contained in any " ſtatutes made as aforeſaid, as equally concern the ſeamen " of England and Ireland, or of Great Britain and Ireland, " ſave ſo far as the ſame have been altered or repealed, " ſhall be accepted, uſed or executed in Ireland, according " to the preſent tenor thereof, reſpectively. Provided, " that all ſuch ſtatutes ſo far as aforeſaid, concerning com- " merce, ſhall bind the ſubjects of Ireland, only ſo long " as they continue to bind the ſubjects of Great Britain.

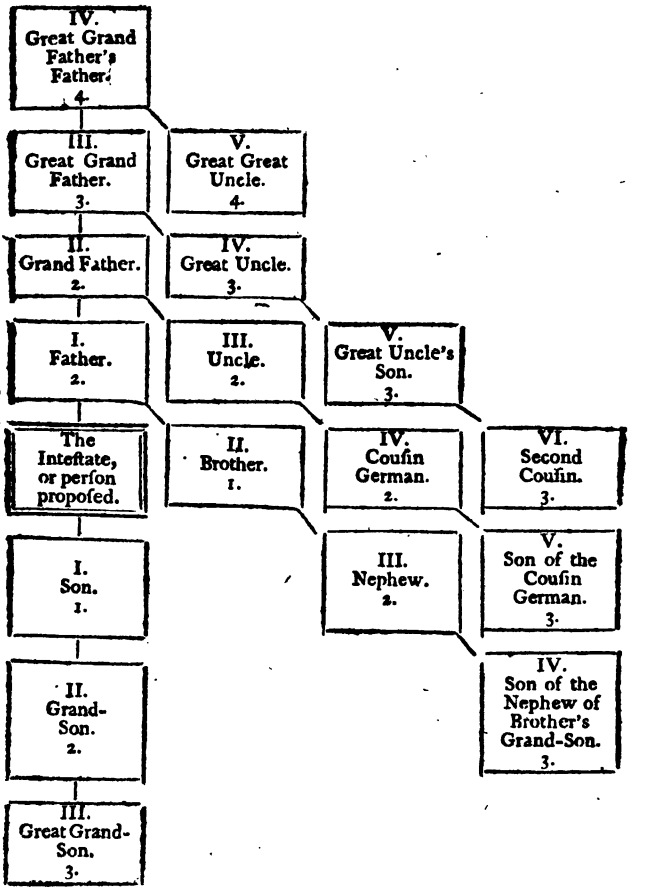
" And it further enacts, that all ſuch ſtatutes made " in England or Great Britain, as concern the ſtile or " callendar; and alſo all ſuch clauſes and proviſions con- " tained in any ſtatutes made as aforeſaid, as relate to the " taking any oath or oaths, or making or ſubſcribing any

" declaration or affirmation in this kingdom, or any penalty " or diſability for omitting the ſame, or relate to the con- " tinuance of any office, civil or military, or of any com- " miſſion, or of any writ, proceſs or proceeding at law, " or in equity, or in any court or delegacy or review, in " caſe of a demiſe of the crown, ſhall be accepted, uſed, " and executed in Ireland, according to the preſent tenor " of the ſame, reſpectively."

It cannot be denied, that theſe general words leave room for many doubts, and it ſtill is often puzzling to determine what is the ſtatute law of Ireland; to give a remarkable inſtance, perhaps, it would not be eaſy to ſay at this moment, whether the oath *ex officio* was or was not ever regularly and expreſsly (however it may have been virtually) aboliſhed in Ireland.

TABLE OF CONSANGUINITY.

The numeral Roman letters at the top expreſſing the degrees by the civil law, and the figures at the bottom thoſe by the canon law.



Order of Administration.	Order of Distribution.
1. Widow.	Widow $\frac{1}{3}$ Children or their Repreſentatives the reſt equally.
2. Child.	If no Children, Widow $\frac{1}{2}$, next of kin or their repreſentatives $\frac{1}{2}$.
3. Father.	If no Widow, Children take all.
4. Mother.	If neither Widow nor Children, next of kin in the following order.
5. Brother or Siſter.	1. Father.
6. Grandfather or Grandmother.	2. Mother and Brothers and Siſters and their repreſentatives.
7. Uncle, Aunt, Nephew or Niece.	3. If both Parents dead, Brothers and Siſters or the ſurvivors of them, with the Children of a Brother or Siſter deceaſed.
8. Couſin German.	4. If no Brother or Siſter alive, Grandfather or Grandmother, or on failure of them, Uncles and Aunts, Nephews and Nieces of the inteſtate, in equal portions *.
9. Couſin German once removed.	5. For want of all theſe the next of kin, according to the computation of the civil law, except with this difference, that a nearer collateral excludes a more remote lineal.
10. Second Couſin.	N. B. No repreſentation among collaterals beyond Brothers and Siſters children, meaning always Brothers and Siſters of inteſtate.
The widow is here put firſt, becauſe uſually preferred, but adminiſtration *may* be granted to the *next* of kin, to be computed in the order of the ſubſequent numbers 10, or jointly with her.	

* By this rule, if no brother or ſiſter alive, the grand parents come in before nephews and nieces, although the latter would ſhare with a mother, which is the extraordinary conſequence of the ſtatute James II. in England, letting them in with the mother, but leaving the preference of the aſcending line (where no repreſentation) in all other caſes according to the ſtatute of Charles II. Both theſe ſtatutes are blended together in Ireland, in that of William III. chap. 6.

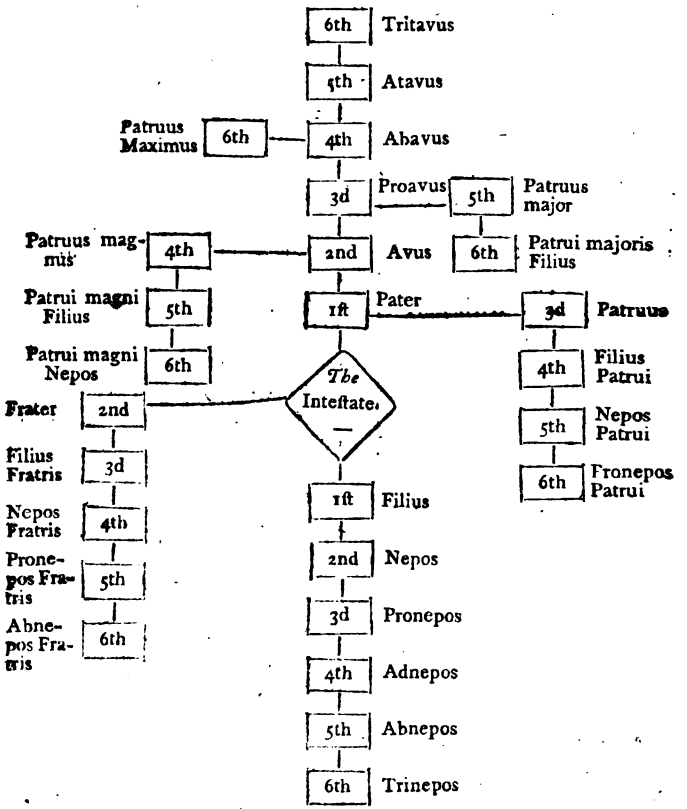
DEGREES

OF

CONSANGUINITY

ACCORDING TO THE

CIVILIANS.



Add to this, that the deſcending line is preferred in infinitum, and the certificate of the civilians in the caſe of

Carter againſt Crawley, viz. " Repreſentatio in filiis " fratrum & ſororum tantum locum habet, ad ulteriores " vero collaterales non extenditur et vocantur ad ſucceſ- " ſionem reliqui collaterales quicunque in gradu ſunt " proximiores remotioribus excluſis ita quod infalabiliter " ſemper prior in gradu ſit potior in ſucceſſione." And the civil law, as it relates to diſtribution, will be very clear.

INDEX.

TO

THE FIRST VOLUME.

	PAGE
Accession	239
Accuſation	447
Actions—And their diviſions	440
Adminiſtrator—Who ſhall be	340
Adminiſtration	341, 342
Adoption—Reaſons thereof at Rome	116
Never introduced in England	ib.
Who might adopt	118
Form thereof	119
Effects thereof	121
Adultery	418
What legal proof thereof	421 and note
Advowſons	176
Alienation	255
Aſſumpſit—And action on the caſe originated in the civil law	443

B.

Bankruptcy	253
Bachelors—In college, whence the name	154

PAGE

Bonorum poſſeſſio - - - - 339
Similitude of our adminiſtration - - ib.
Bribery - - - - 427

C.

Capitis diminutio—Meaning thereof - - 99
Cæſar Auguſtus—Character of him by Sir W. Jones 294
Chancery—Court of - - - 135
Civil death - - - - 125
Civil law—Meaning of its rule, nemo proteſt mori ex parte teſtatus, &c. &c. - - 220
Codicils - - - - 292
Collatio bonorum - - - - 343
Colleges—College property and leaſes - - 159
When they aſſumed their preſent form - - 150
How the civil law contributed to their advancement 152
Caſes relative to colleges - - 150
Collegiate duties - - - - 154
At Rome - - - 162
Privilege annexed to proficiency in ſcience at Rome 163
Privileges of colleges with us - - 160
Commodatum - - - - 350
Commons - - - - 177
Concubine - - - - 80
Conditions—In reſtraint of marriage - - 79
Conſideration—Want of it, how cured by the civil law 358
Contracts quaſi - - - - 386
Claſſification of them by the civil law - 347, 348
Nominate - - - - 349
Innominate - - - - 334
Ex verbis - - - - 357
Ex literis - - - - 362
Ex conſenſu - - - 363
Of ſale - - - - - ib.
Of exchange - - - 371
Of hiring - - - - 372

PAGE

Contracts—Of marriage de præſenti & de futuro - 56
Corporations - - - - 141
Origin of them at Rome - - ib.
How divided by the civil law - - 142
How created at Rome - - - 143
How in England and Ireland - - ib.
Sole, unknown to the ancients - - 142
Two might make a corporation by the canon law ib.
Power and capacities thereof - - 144
Could not take or purchaſe without a licence by the civil law - - - 145
Our law on that head - - - ib.
What majority of the community bound the reſt 147
Corporations, how diſſolved - - 148
Negative given to the heads - - 150
Proteſting, power of - - - 151
Cox, Mr.—His excellent notes on P. Williams - 263
Crimen falſi - - - - 426
Culpa—Lata, levis, leviſſima - - - 354
Advantage of the Greek tongue in expreſſing its ſhades - - - - ib.
Curators—What - - - 130, 139

D.

Damage - - - - 401
How diſtinguiſhed from injury - - 402
Debts—Diſtinction between the civil law and ours, as to payment of debts - - - 220
Degrees—Of kindred, how computed by the civil law 61
In colleges, whether a mandamus would go for them, and whether they can be now given in the canon law - - - 157
and ſee the table of errata.
Delivery—Or tradition - - - 256
Denunciation - - - - 447
Deportation—What - - - 125

PAGE

Derelicts - - - - 239
Descent—Canons of descent by the civil law - 61, 62
How they differ from ours - - 222-228
Distribution—Statute of, whether borrowed from the civil law - - - - 217
Observations on it - - - - 225, 232
Divorce - - - - - 86
First instance of it at Rome - - 90
A vinculo matrimonii - - - 86
A mensa & thoro - - - - 87
Solemnization thereof at Rome - - 91
Intention of the reformatio legum thereon - 90
Donatio—Mortis causa - - - 261
Propter nuptias - - - 266
Dublin—University of, negative power of the head 150
Whether the Fellows need take the oaths in the king's courts. N. B. they take them before the visitors - - - 154
Deficient in privileges - - - 160

E.

Ecclesiastical court—Sentence therein - - 97
How far conclusive evidence - - ib.
Practice thereof - - - 451
Emancipation - - - - 126
Emphyteuses—Or fee farm leases - - 192
Estates—In tail, whether known to the civil law - 188
For life - - - - 191
For years - - - - ib.
At will and by sufferance - - - 198
Escheat - - - - 250
Exchequer - - - - ib.
Executors - - - - - 309
One proving a will sufficient for all - - 303
Whether they can claim for trouble and pains - 309
Different with us from the hæres factus of the Roman law - - - - ib.

PAGE

F.

Falcidian—Law - - - 306
Fiſcus—Difference between it and ærarium, and the patrimoniale - - - 250
Fiſhery—Right of - - - 171
In Ireland - - - ib.
Forfeiture - - - 232
Frauds—Statute of, as to wills - - 280, 332

G.

Gifts - - - - - - 259
Giſborne, Mr. - - - - 511, App.
Guardians—And to whom appointed at Rome - 130
How appointed - - - ib.
Different ſpecies thereof - - - ib.
Guardian—Known to our law - - 131
Duty of a guardian - - - 138
Origin of chancellor's power to appoint guardians ib.
Duty and power of guardians with us - 136, 137
Difference between tutor and curator - - 130

H.

Heir—Natural, and of the Roman heir and heirſhip 182
Inſtitution of the *hæres factus* by will - - 300
Hiring—Of labour - - - - 372
Of profeſſional labour, how conſidered at Rome 374
Homicide - - - - 422
Whether manſlaughter a diſtinction in the civil law ib.
Huſband and wife—Might ſue each other at Rome - 83
Might grant and contract with each other - 82
He not anſwerable for her debts or injuries by the civil law - - - 84
Could not be witneſs againſt each other - 85
Real ground of this prohibition - - ib.
His power over wife's perſon - - ib.

PAGE

Infancy—Definitions thereof - - 56
Injury - - - - 403
Inquiſition - - - - 447
Interdiction—Of water and fire, ab aqua & igni, reaſon of it - - - - 125
Intereſt - - - - 376
Invention—Or finding - - - 237
Judges—The real judges at Rome were called magiſtrates 436
Corruption in them, how puniſhed at Rome - 427
At Rome not permanent - - - 437
Judices—At Rome, how conſtituted - 430, 435
Correſponded to our juries - - ib.
Not to our judges - - - ib.
When they went into diſuſe - - 438

K.

Kingſton, Ducheſs of—Her caſe - - 96

L.

Lawyers—Practice of them at Rome - - 366
Proculeians and Sabinians - - ib.
Their fees, how conſidered at Rome - 374 and note
Immoderate fees reſtrained by law - - 375
Leaſes—Of colleges - - - 159
Act giving power to corporations to leaſe under half value in Ireland, copy thereof, - Append.
Leaſes—In France and Switzerland - 191 and note
Long leaſes whether uſeful - - 198 and 35
Legacies - - - - 318
Conditional - - - - 321
Alternative - - - - 323
Accumulative - - - 324
The ademption of them - - - 328
Rules of our law concerning them - - 327
Legitimation—Modes thereof - - - 113
Rejected in England, and why - ib. in note

PAGE

Leſſee—Intereſt at Rome - - - 193
Libels—How puniſhed by the civil law - 296 and 406
Liberal arts—What ſo conſidered at Rome - 375
Liberti and Libertini—The diſtinction between them 99
Limitation—Of actions - - - 249
Of criminal proſecutions - - 259

M.

Mandatum - - - - - 381
Marriage—Why ſlightly treated of in the inſtitutes, 50 in note
How conſidered by various laws - - - ib.
How contracted - - - 151
Effects thereof - - - - 82
How diſſolved - - - 86
Engliſh marriage act never enacted in Ireland - 59
Laws againſt clandeſtine marriages in Ireland - 78
Laws againſt forcible marriages in England and Ireland - - - - 54
Diſtinction between marriages void and voidable 68
Diſtinction between promiſes to marry and promiſes in conſideration of marriage - - 70
Conſent of parents, how far neceſſary - - 58
Marriage morganatic - - - 71
Roman ceremonies of marriage - - 73
Requiſites, beſides actual contracts, to valid marriage in England and Ireland - - - 74
Marriage by uſe - - - - 72
In Scotland - - - - ib.
Iriſh act as to marriages of Proteſtant ſectaries - 75
Iriſh laws as to marriages of Papiſts - - 78
Of idiots and lunatics - - - - 55
Of minors - - - - 56
Solemn at Rome - - - 71
Second forbidden within the year at Rome - 67
Mines - - - - - - 238
Minority—When it ended at Rome - - 129

PAGE

Mortgages - - - - 200
Pignus and hypotheca, how they differed - 201

N.

Negative—How far given to heads of corporations 149,150
Nudum pactum—The meaning of it different in the civil law and ours - - - - 358
Nuptiæ & Matrimonium—Differ - - 74

O.

Obligations—How diſſolved - - 388
Occupancy - - - - 234
Offences—Againſt religion - - 411

P.

Paraphernalia - - - - 269
Partnerſhip - - - - - 378
Paternal power—Queſtion thereon in the royal family of England - - - 112
At Rome - - - - 122
In England and Ireland - - - 124
Controlled by chancery - - 126
Parricide—How puniſhed by the Scotch law 423 in note
Path—Towing - - - - 178
Pignus - - - - 201
Practice—Of eccleſiaſtical courts - - 451
Prætor—At firſt not governed by precedent - 437
Preſcription - - - - 246
Price—Of commodities, whether the legiſlature ſhould ever interfere with it - - 369
Probate—Of wills - - - 338
Property—Origin of - - - 167
Proteſting—Power thereof incident to members of corporations - - - 151

PAGE

Q.

Quaſi torts - - - - 406
Contracts - - - - 386

R.

Regents and non-regents—In univerſities - - 153
Relegation—What - - - 125
How it differed from exile - - - ib.
Remainders and reverſions - - - 213
How far they exiſted in the Roman law, and the opinions of Smith, Gibbon, and Halifax thereon - - - - 214
Rents - - - - 178
Repreſentation—Rules of, by our law - - 223-233
Revocations of wills—Expreſs - - - 332
Implied - - - - - 334
How affected by ſtatute of frauds - - 333
Robbery - - - - 400, 424
Whether it ought to be puniſhed with death - 396

S.

Servitutes or Services - - - 181
Simony - - - - 253
Slavery—Pretended juſtifications thereof - 98
How created - - - - 100
At Rome compared with that of the villein and negro - - - - 104
How diſſolved - - - - 108
Slaves—At Rome conſidered not as perſons but things 100
Maſters power over them - - 103
Of puniſhment, ſervi pœnæ - - 125
Societies - - - - - 378
Stellionate - - - - 426
Stipulations - - - - 357
Stuprum—What - - - 77, 421

PAGE

Succeſſion—To perſonal eſtate - - 220-232
Suicide - - - - 424
Sureties - - - - 361

T.

Tenures - - - - 187
Teſtaments - - - - 272
Solemn - - - - - 273
Form and manner of making by the civil law - 277
Signing - - - - - 278
Atteſtation - - - - 279, 286
Rules for interpreting them - - - 312
Imperfect - - - 334
Revocations of them - - - 332
Theft - - - - 397, 424
Things—Extra patrimonium - - - 169
Common - - - - - 170
Public - - - - ib.
Univerſitatis - - - - 172
Nullius - - - - ib.
Diviſion of them different by the civil and the feudal laws - - - - - 173
Tithes - - - - - 176
Titles to things—How divided - - - 234
Toleration—Acts of, no head in the civil law - 413
Treaſon - - - - 414
Treaſure—Trove - - - 237
Truſts - - - - 190
Improperly compared to the Roman fidei commiſſa 331
Tutor—Difference between tutor and curator - 130

U.

Uſufruct - - - - 184

V.

Viſiters and viſitatorial power - - - 156

W.

	PAGE
War—Different consequences thereof, in ancient and modern times	236
Ways	177
Wilberforce, Mr.	341
Wills—Probate of them	338
Solemn—nuncupative	288
Inofficious	337
Unsolemn privileged	290
How avoided by the civil law	331
Witnesses to wills, credible and competent	283 in note
Statute of frauds as to them	280, 332
Who could make them	295
Of what	299
Witchcraft	413
Women—Their power to make wills	298
Under perpetual guardianship at Rome	130
Could enter into contracts, though married	82, 83
Wreck	238
Wrongs—Private	395
Public	411

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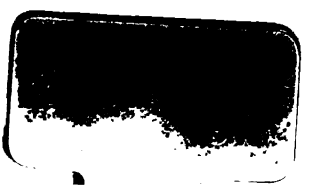
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